U-I-249/10
4 April 2012

DISSENTING OPINION OF JUDGE JASNA POGAČAR

I voted against the Decision because I do not agree with the assessment, which is based on the findings that the first and second paragraphs of Article 42 of the Public Sector Salary System Act (hereinafter referred to as the PSSSA) excessively interfere with the right of representative trade unions to represent their members during the collective bargaining process when a collective agreement for the public sector may be concluded even though it is opposed by a representative trade union which is the only one uniting civil servants from a specific public sector category and even though it is opposed by representative trade unions which have a greater number of members who are civil servants in a specific category than representative trade unions which also represent such category and support the conclusion of the collective agreement. In this dissenting opinion, I would like to present my thoughts on the subject of exercising the freedom of trade unions in the public sector.

The freedom of trade unions is a fundamental freedom regarding which the Constitution does not explicitly require that the manner of its exercise be regulated by law, and it also does not provide for any possibility of limiting this freedom. According to the general rule determined in Article 15 of the Constitution, the manner in which the freedom is to be exercised may be determined by law if such is necessary due to its nature; limitations are only permitted in order to protect the rights of others or the public interest. This rule does not prevent the legislature from regulating the issues [the regulation of which is] required in order to allow trade unions to exercise their freedom effectively in all the environments in which it is exercised. It is not possible to deny the freedom to establish and join trade unions or the freedom of action of trade unions in the public sector. However, I wonder whether it is constitutionally admissible to introduce specificities related to exercising the right to collective

bargaining in an environment that is, by its very nature, fundamentally different to the private sector. This refers to the public sector within the meaning of the Civil Servants Act (hereinafter referred to as the CSA) and the PSSSA.[1] International labour standards allow for the exercise of the right to collective bargaining to be adapted to the way in which the public sector operates; this is demonstrated by the Convention concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service (hereinafter referred to as ILO Convention No. 151)[2] and the Convention concerning the Promotion of Collective Bargaining (hereinafter referred to as ILO Convention No. 154).[3] I believe that the scope of their application cannot depend on literal translations, as there is no definition of the public sector for the European area; there are only a basic framework identifying the characteristics of the public sector and standards that are applicable to its roles as an authority and service provider. The scope and the manner in which the public sector operates are, however, subject to national regulations. In this context, the public sector consists of entities that do not operate on the basis of the principles of free economic initiative, because they are required, e.g. when carrying out the responsibilities of the state, to continuously and without interruption provide public goods, as a result of which they receive public funding and are included in the fiscal system. It is evident from the reasons of the draft law on the ratification of ILO Convention No. 151 that the purpose of its ratification was its application to persons that are defined as civil servants in the CSA.[4] Therefore, the question arises as to whether the inclusion in the public sector as such dictates that specificities be introduced,[5] and whether the nature of a specific position in the civil service or the content of the responsibilities involved dictates that limitations be introduced.[6]

When reviewing whether the second paragraph of Article 7 of the PSSSA is consistent with the second paragraph of Article 120 of the Constitution, the Constitutional Court explained that the persons authorised to conclude collective agreements were limited by the PSSSA, i.e. by certain general principles or rules that must be taken into account when adopting the mentioned legal acts.[7] However, in case no. U-I-256/08, the Constitutional Court was not required to consider the relationship between collective bargaining and the regulation contained in the CSA and the PSSSA. In the case at issue, the applicants substantiate their allegations regarding the inconsistency with Article 76 of the Constitution with the explanation that the law should not determine the content of the collective agreement for the public sector, because the purpose of collective

bargaining was to obtain more favourable rights than those determined as the statutory minimum. Such interpretation would not require an answer if the review of the Constitutional Court had remained within the boundaries of the challenged provisions of the Act Amending the Public Sector Salary System Act (hereinafter referred to as the PSSSA-O) and within the boundaries of the claims that, during the negotiations, the state authoritatively changed the rules agreed upon through social dialogue and secured a better position for itself as a social partner. By expanding the review to include the first paragraph of Article 42 of the PSSSA-O, the decision-making of the Constitutional Court departed from the review of the allegations and focused instead on the substantive issues with regard to exercising the right to collective bargaining in the public sector. However, the problem is that the initial findings and the positions that have followed these findings do not take into account the content of the CSA and the PSSSA, which determine the autonomy of collective bargaining; in fact, these findings and positions do not constitute a position on the question of whether the state excessively restricted the autonomy of collective bargaining in the public sector, but instead uncritically follow the premises and standards that have been established in the private sector.

It is explained in the Decision of the Constitutional Court that the autonomy of collective bargaining is more restricted in the public sector; however, it is not explained how the regulation differs in the private sector. The wording of the second paragraph of Article 1 of the PSSSA[8] reveals that the purpose of adopting the PSSSA was to determine a common basis in order to ensure that the system is comparable and manageable. It is evident from the legislative materials[9] that the key aims of the PSSSA are: (1) to establish a universal salary system for all civil servants and officials; (2) to determine appropriate ratios between the salaries of civil servants and functionaries; (3) to establish a flexible salary system, linking salaries to effectiveness and work performance; and (4) to ensure that the salary system is transparent and manageable in fiscal terms. The issues regarding the status of specific categories of civil servants are subject to negotiations leading to the conclusion of collective agreements for a specific sector or for a specific budget user (e.g. collective agreements for RTV [i.e. the national radio and television broadcasting network]) or occupation. A collective agreement for the public sector is an agreement *sui generis*, as it regulates the common characteristics of the salary system as a whole. The state delegated the power to regulate the common characteristics that will ensure the comparability of salaries in the salary system to the social partners and included all representative

trade unions, regardless of how they are organised, in the decision-making process regarding these common characteristics. The PSSSA determines the content of the collective agreement[10] and each party to the agreement may propose that other common characteristics be regulated through negotiations. The collective agreement for the public sector does not determine salaries. The salaries were also not regulated in the context of determining benchmark positions and titles; benchmark positions and titles were used in order to provide an abstract comparison between and within pay groups, which facilitated the process of determining basic salaries through the classification of specific positions and titles. However, all this has already been implemented, i.e. through sectoral collective agreements, regulations, and general acts; the collective agreement for the public sector only determined the basic salaries of those ancillary posts that are not characteristic for the sector, the budget user, or the occupation in question.

In the private sector, there exists the rule that only rights which are more favourable to workers than the statutory minimum (the *in favorem* rule) may be determined in a collective agreement; the exceptions to this are explicitly determined. A representative trade union negotiates for the benefits of the workers it represents; the *erga omnes* effect of the concluded collective agreement is intended to ensure the same working conditions for all. If collective bargaining in the private sector fails, the level of rights already achieved or the statutory minimum applies. In the public sector, where according to the CSA and the PSSSA the salaries are regulated in more detail by authoritative acts and where there is considerable centralisation, there are no statutory minimum rights provided by law, and the collective agreement for the public sector replaces authoritative regulation. Representative trade unions negotiate on common characteristics regarding all civil servants to whom the collective agreement for the public sector applies,[11] meaning that in such negotiations it is not possible to enforce a position that does not follow the principle of comparability. In the event of unsuccessful collective bargaining, also in the public sector the existing regulation applies; however, the state is required to adopt an authoritative act in place of the missing regulation and may perhaps interfere with the existing salary regulation by means of an intervention measure.

In the public sector, the state has the role of a regulator and a social partner. I shall not consider the question of whether, in the case at issue, the state disturbed the balance between those two roles and inadmissibly interfered with

the right to freedom of action of trade unions by changing the rules agreed upon through social dialogue. However, I believe that given the autonomy of collective bargaining, as regulated by the CSA and PSSSA, it is not possible to construe that the state excessively interfered with the rights of trade unions. It was agreed through social dialogue that all representative trade unions are parties to the collective agreement for the public sector. The rules to determine validity, which recognise a greater level of representativeness to those representative trade unions that jointly reach a predetermined limit of representation of civil servants to whom the collective agreement for the public sector applies, cannot in themselves restrict the activities of representative trade unions, provided they have the possibility of voluntarily and freely deciding whether to participate in the collective bargaining process and which interests, with regard to the interests of the members that they represent, they will attempt to further within the framework of the common characteristics. The absence of authoritative rules regarding the organisation of employees as parties to negotiations allows all the representative unions to participate in accordance with their will in establishing negotiating positions and in the work of the workers' negotiation group. The fact that representative trade unions act as one party to the agreement in the context of the regulation of the common characteristics requires them to act jointly, and the rules that empower specific representative trade unions or even require their members to be counted weaken their bargaining power and render social dialogue difficult. The content of the autonomy of collective bargaining, which given the applicable regulations has to be taken into account, prevents a specific representative trade union from negotiating different or better salary regulations for its members in negotiations on regulation of the common characteristics. I also wonder whether the right to freedom of action of trade unions precludes the introduction of such a social dialogue model between the employers' representatives and civil servants, the subject of which is the regulation of the common characteristics of the salary system.

Jasna Pogačar

Notes:

[1] The public sector consists of state authorities and local community administrations, public agencies, public funds, public institutions, public

commercial institutions, and other entities governed by public law that are indirect users of the state budget or a local community budget. Civil servants are the persons employed by these entities governed by public law (with the exception of functionaries). Officials are civil servants in the state authorities and local community administrations.

[2] It is evident from the Notification of the Entry into Force of the Convention concerning the Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service (Official Gazette RS, No. 80/11, MP, No. 12/11) that the Convention entered into force in the Republic of Slovenia on 20 September 2011. The preamble to the Convention (the Act ratifying the Convention concerning the Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service (ILO Convention 151), Official Gazette RS, No. 55/10, MP, No. 10/10) explains that the reasons for its adoption were in particular: (1) considerable expansion of public-service activities in many countries and the need for sound labour relations between public authorities, acting as employers, and public employees' organisations, (2) great diversity of political, social, and economic systems among member States (e.g. as to the respective functions of central and local government, of federal, state, and provincial authorities, and of state-owned undertakings and various types of autonomous or semi-autonomous public bodies, as well as to the nature of employment relationships), (3) different interpretations of the content of international instruments and of the application of the Right to Organise and Collective Bargaining Convention, 1949, to the public sector, and the observations of the supervisory bodies of the ILO that some member states do not apply ILO Convention No. 98 to large groups of public employees.

[3] As regards the public service, special modalities for the application of this Convention may be fixed by national laws or national practice (the third paragraph of Article 1 of ILO Convention No. 154).

[4] See the Draft Act ratifying the Convention concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service (ILO Convention No. 151), Official Gazette of the National Assembly, No. 61/10.

[5] Article 7 of ILO Convention No. 151 provides as follows: “Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for negotiation of terms and conditions of employment between the public authorities concerned and public employees' organisations, or of such other methods as will allow

representatives of public employees to participate in the determination of these matters.” Article 9 provides as follows: “Public employees shall have, as other workers, the civil and political rights which are essential for the normal exercise of freedom of association, subject only to the obligations arising from their status and the nature of their functions.”

[6] [The second paragraph of] Article 1 of ILO Convention No. 151 provides as follows: “The extent to which the guarantees provided for in this Convention shall apply to high-level employees whose functions are normally considered as policy-making or managerial, or to employees whose duties are of a highly confidential nature, shall be determined by national laws or regulations.”

[7] Constitutional Court Decision No. U-I-256/08, dated 18 February 2010 (Official Gazette RS, No. 16/10).

[8] The first sentence of the second paragraph of Article 1 of the PSSSA reads as follows:

“This act determines the common foundations of the public sector salary system, in order to enforce the principle of equal pay for comparable occupations, to ensure the transparency and comparability of pay and occupational groups, and for an incentivised reward system.”

[9] The draft law on the public sector salary system, which was prepared for the first reading (EPA 414), and the Information on Salaries in the Public Sector (Part II, March 2011) are published in the Official Gazette of the National Assembly, No. 9/02.

[10] Pursuant to the PSSSA, the collective agreement for the public sector:

- determines benchmark positions and titles, and classifies them into pay groups,
- classifies positions in the J pay group into pay grades (ancillary posts for the whole public sector);
- determines the amount [of funds] for rewarding job performance;
- determines the criteria for determining the part of the salary based on job performance;
- determines the allowance amounts to which everyone is entitled under the same conditions;
- determines the adjustment of pay grade values.

[11] The PSSSA determines a special regulation for functionaries, diplomats, soldiers, the police, school principals, directors, and others.