

U-I-137/93-24
2.6.1994

DECISION

At the meeting held on 2 June 1994 and concerned with the evaluation of constitutionality, the Constitutional Court discussed the proposal of the Trade Union of Education, Training and Science of Slovenia, and

made the following decision:

The provision of paragraph 1 of Article 76 of the Social Security Act (Official Gazette of the Republic of Slovenia, nos. 54/92 and 56/92) shall be abrogated.

Reasons:

A.

The Trade Union of Education, Training and Science of Slovenia as proposer claims that the provision of paragraph 1 of Article 76 of the Social Security Act, which stipulates that professional workers delivering social security services under the said Act shall be obliged to associate in the Chamber of Social Security, is in conflict with the provision of paragraph 2 of Article 42 of the Constitution, which provides that each person shall have the right to freely associate with others. The proposal is justified primarily by the assertion that, while it is true that paragraph 3 of Article 42 of the Constitution provides as lawful the restricting of this right in circumstances involving national security, public safety or the protection of the public against the spread of infectious disease, there is no evidence of the existence of these reasons in the case under consideration. They also claim that compulsory association in the Chamber of Social Security would only be justifiable in the case of legal persons and self-employed persons delivering a public service under a concession in the field of social security, because of the necessity of public control over social security work of such self-employed persons or legal persons, which could be performed most easily by the Chamber of Social Security as an institution under public law. For this reason, they propose that the Constitutional Court should start the procedure as soon as possible, find the disputed provision of the Act to be contrary to the Constitution, and abrogate it.

In its reply, the National Assembly claims that the proposal for evaluation of constitutionality of paragraph 1 of Article 76 of the Social Security Act is unjustified. For the intention of this provision is not the restricting of the right of association of individual categories of workers in the field of social security, but their associating with a view to ensuring the development and professional improvement of social security sector. In the Act, these intentions and objectives are consistently realised within the framework of the duties of the Chamber of Social Security, which include, inter alia, the adoption of a code of conduct of workers in the field of social security, the planning, following and supervising of professional work, the planning and organization of professional training, the training, controlling and planning of probation, and other tasks of importance for workers in the field of social security. The Chamber of Social Security, then, is a form of professional association, but it does not prevent professional workers from associating in more specific professional associations, nor does it restrict them in their doing so.

In the preparatory phase, the Constitutional Court also heard representatives of the parties involved.

B.

With its proposal, the proposer has raised an important and undoubtedly pressing issue of interpretation of paragraph 2 of Article 42 of the Constitution. In the present dispute, the Constitutional Court had to establish in the first place whether this provision also referred to compulsory association in the cases involving the performing of public services and the association in institutions under public law exercising public powers. The same kind of question had already been considered by the Constitutional Court in reference with the case U-I-48/92 dealing with compulsory association in the Chamber of Doctors of Medicine as prescribed by paragraph 1 of Article 85 of the Medical Services

Act (Official Gazette of the Republic of Slovenia, nos. 9/92 and 26/92), when it had resolved not to start the proceedings for evaluation of constitutionality of that provision of the said Act. The reason being, that it had established that the Chamber of Doctors of Medicine had been a legal person under public law exercising public control over medical practice end founded in accordance with the will of the law-giver. Thus, compulsory association in it does not imply any restricting of the right protected in paragraph 2 of Article 42 of the Constitution.

The provision of paragraph 1 of Article 76 of the Social Security Act prescribes compulsory association of professional workers delivering social security services mentioned in Article 69 of the same Act in the Chamber of Social Security.

In the same way as paragraph 1 of Article 85 of the Medical Services Act, which prescribes compulsory association only in the case of doctors of medicine and dentists providing medical services and working directly with patients, the disputed provision of the Social Security Act also prescribes compulsory association only for those professional workers mentioned in Article 69 of the said Act who are engaged in the delivery of social security services.

In accordance with provisions of Article 77 of the Social Security Act, the Chamber of Social Security shall be concerned with the integration, development and professional improvement of social security sector and shall perform such tasks as also include the exercise of public powers specified in clauses 2, 3, 4 and 5 of paragraph 2 of Article 77 of the Act. In the opinion of the Constitutional Court it is because of such powers that the Chamber of Social Security, in the same way as the Chamber of Doctors of Medicine, can not be classified as an association referred to in paragraph 2 of Article 42 of the Constitution. For it is not an association under private law, which can only be based on voluntary and free activities of its members, but an institution under public law established by statute and exercising public powers. This is why, from the point of view of Article 42 of the Constitution, the disputed provision of the Act is not in conflict with the Constitution.

In the case under consideration, however, the Constitutional Court also assessed the question of whether the mere character of an association as one falling under public law is sufficient to justify compulsory association in it. Namely, in the case of compulsory association, Article 35 of the Constitution should be taken into consideration in addition to Article 42. By guaranteeing the protection of the physical and mental integrity of each person, as well as of his right to privacy and his other personal rights, the former also guarantees the so called general freedom of action of people.

Compulsory association in an association under public law, such as is also the Chamber of Social Security, implies interference with such general freedom of action of people, that is, with their constitutional right granted in Article 35 of the Constitution. In accordance with paragraph 3 of Article 15 of the Constitution, constitutional rights can be limited in such cases as are specially determined by the Constitution (and this is not so in the case of the rights referred to in Article 35), and when this is necessary to protect the rights of others ("Human rights and fundamental freedoms shall only be limited by the rights of others and in such cases as are determined by this Constitution"). Consequently, the State may prescribe that persons employed in professions and activities whose execution interferes with the rights of other persons, such as for example the medical profession and also the delivery of social security services, shall be obliged to associate in professional chambers or similar associations under public law for the purpose of improving and ensuring to a greater extent the protection of the rights of other persons for whom such services are intended.

In accordance with the established and generally accepted notions prevailing in the world, restricting of constitutional rights is only allowable if in conformity with the so called principle of proportionality, which means that such restrictions or measures can be allowed under three conditions (necessity, appropriateness and proportionality in the narrower sense): 1.) a measure must be necessary - in the sense that the objective can not be reached by any other milder interference with a constitutional right, or even without it; 2.) the measure must be appropriate for achieving the desired, constitutionally admissible objective (for example, to protect the rights of other persons or, also, public interest, when protection of public interest is a constitutionally admissible objective directly or indirectly - in that the public interest serves as a protection for the rights of other persons) - appropriate in the sense that the objective can be reached by it; and 3.) consideration should also be paid to the so called

proportionality in the narrower sense, which means that in assessing the urgency of a measure the importance of the right injured by such a measure should also be assessed in comparison with the right to be protected by such a measure, and the urgency of the measure should be determined in proportion to the gravity of the injuries resulting from it: only when a protected right is entitled to absolute priority on the basis of its importance, a major encroachment upon the former right may also be allowed - in other cases the extent and importance of encroachment upon such a right must be proportionate to the importance of the other protected right, or, in other words, no measure is a priori admissible with a view to fully protecting a protected right, even though necessary, when the other right is also entitled to the same degree of protection; in the case of conflicts between such rights the level of interference with one such right should not be allowed to ensure absolute protection of the other right but should be proportionate to the first right (with both rights thus mutually limiting one another).

In the case of compulsory association in the Chamber of Social Security under consideration, the Constitutional Court finds that such encroachment upon the general freedom of action of people is not indispensable, and this in spite of the presence of public interest in connection with the implementation of the programme of social security and the delivery of social security services within its framework. The Chamber may perform its duties, including those defined as public powers, regardless of the obligations of its members. This is why the Constitutional Court found the disputed provision to be in conflict with Article 35 of the Constitution, and, in this connection, did not even consider the evaluation of appropriateness and proportionality of the measure.

C.

This Decision was made on the basis of paragraph 1 of Article 21 of the Law on the Constitutional Court (Official Gazette of the Republic of Slovenia, no. 15/94) by the Constitutional Court in the following composition: Dr. Tone Jerovšek, President, and Dr. Peter Jambrek, Matevž Krivic, M.L., Janez Snoj, M.L., Dr. Janez Šinkovec, Dr. Lovro Šturm, Franc Testen, Dr. Lojze Ude and Dr. Boštjan M. Zupančič, the judges. The Decision was reached with five votes in its favour and four against it (The judges Jambrek, Snoj, Testen and Ude voted against). A positive separate opinion will be prepared by the judge Krivic, and negative separate opinions by the judges Jambrek and Ude.

P r e s i d e n t:
dr. Tone Jerovšek