

Decision

dated 12 February 1991 (K. 6/90)

The Constitutional Tribunal sitting with the bench composed of the Chairman and Vice-President of the Constitutional Tribunal, Leonard Łukaszuk and Judges: Czesław Bakalarski, Tomasz Dybowski (Reporting Judge), Kaaznierz Działocha, Antoni Filcek, Henryk Groszyk, Wojciech Łączkowski (Reportirig Judge), Maria Łabor-Soroka, Remigiusz Orzechowski, Mieczysław Tyczka, Janina Zakrzewska, Andrzej Zoll.

(...)

held

1. that article 1 of the Act dated 20 January 1990 on Amendments to the Organization and Activities of Cooperatives (Journal of Laws, Number 6, Item 36) conforms with article 84, sections 1 and 2, and article 6 of the Constitution of the Republic of Poland;

2. that article 19, section 1 of the Act dated 20 January 1990 on Amendments to the Organization and Activities of Cooperatives, inasmuch as it prevents the voluntary association of cooperatives until a new statute on cooperatives is passed, contravenes article 84, sections 1 and 2 of the Constitution of the Republic of Poland;

3. that the rest of article 19, section 1 of the Act dated 20 January 1990 on Amendments to the Organization and Activities of Cooperatives conforms with article 84, sections 1 and 2 of the Constitution of the Republic of Poland.

Reasoning

(...)

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(...)

1. Article 84 of the Constitution formulates the civil freedom of association. The freedom of association is aimed at – as follows from article 84, sections 1 and 2 – the joint development of citizens' political, social, business and cultural activity. The kinds of activity enumerated are defined only very generally, which means that joint active participation of citizens in social life may take various forms in specific situations and that the specific aims of joint activity of citizens may be diverse, too.

It follows from the content of article 84, section Z of the Constitution that not all kinds of group activity of citizens are meant in this provision, but only those kinds that are organized and exhibit a certain permanence. Hence, the social activity signified by article 84 of the Constitution does not include spontaneous actions taken even by large groups of citizens (e.g. fighting a fire in common, or even organized joint activities but not permanent as for instance a demonstration or fundraising). The organizational forms that a joint activity of citizens may take are named in article 84, section 2 of the Constitution. Their enumeration, however, is only by way of example, which is attested to by the words used: „as well as other social organizations.” For this reason, no undue importance should be attached to the names of the organizations listed in the provision.

The civil freedom of association is by no means absolute. Article 84, section 3, prohibits setting up associations whose objective and activities would threaten the social and political system or the legal order of the Republic of Poland. The amendment of this provision whereby the name of the country was changed from the „People's Republic of Poland” to the

„Republic of Poland” indicates that the contemporary Polish State and its current and emerging system of government and social and economic orders are meant and not those in existence in 1952.

Article 84, section 3 is an exception to the freedom of association laid down in the preceding two clauses and it cannot, therefore, be subject to broad (intensive) interpretation. The general wording used in article 84 of the Constitution makes it necessary for the rule of law laid down in this provision to be specified in numerous provisions contained in regular legislation. This is a legitimate procedure and often indispensable as long as it does not interfere with the freedom of association.

The provisions of regular statutes provide for various organizational forms, adjusted to different purposes, of joint social activities of citizens. Such forms provide ready-made legal models, among which citizens intending to join their activities are free to choose depending on the goals they intend to attain in common and the legal consequences they wish to produce. Citizens fill these forms with specific contents making sure that they do not go beyond the legal framework provided for them. To individual organizational and legal forms, the lawmaker may attach different legal effects, taking care, first and foremost, to protect the interests of the citizens who joined the organization as well as those who did not. The range of such legal and organizational forms offered by the lawmaker and legal effects attached to them is enormous. By way of example, one can name here political parties; trade unions, societies and associations. They are regulated by various branches of the law such as constitutional law, administrative law, civil law and criminal law. As far as the attainment of business goals is concerned, the lawmaker provided for such organizational forms as cooperatives, companies or partnerships (civil, registered, limited liability, joint stock, or mixed) foundations entitled to conduct business, chambers of handicrafts, professional corporations of lawyers, etc. To each of these organizational forms, different legal effects are attached and different conditions must be met so that the citizens who set up such organizations can produce legal effects provided by the lawmaker for each of these diverse organizational forms, in particular effects valid in respect to third parties. Such conditions are not a restriction of freedom of association because if they do not suit the citizens, the citizens do not avail themselves of the organizational forms of conducting business suggested by regulations and choose a different legal and organizational form. They may even take up some joint activity in an organizational form not provided for in any regulations, if such an activity does not contradict article 84; section 3 of the Constitution: However, if they do not satisfy the conditions set by the law; which are usually stipulated by the lawmaker to ensure the safety of legal transactions, they will not be able to bring about legal consequences, in particular in respect to third parties for which the lawmaker made the fulfillment of the appropriate conditions pre-requisite. (...)

2. Owing to the primarily business nature of cooperatives, the other important constitutional provision, which should be taken into account while deciding the case, is article 6 of the Constitution. Pursuant to this provision, the Republic of Poland guarantees the freedom of economic activity; the clause continues by saying that a statute may restrict the freedom of economic activity. Article 6 of the Constitution, contrary to article 84; does not define, even in general terms, any grounds for restricting the freedom of economic activity. The only condition imposed is the stipulation that a provision restricting this freedom must be of a statutory rank. It follows that a statute may restrict the freedom of a specific economic activity if it threatens any interest deserving protection according to the lawmaker. This may be illustrated by anti-trust legislation.

Both provisions, i.e. article 84 and article 6 of the Constitution, include guarantees of civil liberties and on many an occasion are simultaneously applied. For instance, freedom of

association may not be implemented if it were to thwart the freedom of economic activity in a specific situation. For these reasons, the provisions of the Act on Amendments to the Organization and Activities of Cooperatives questioned in the petition must be compared with both articles of the Constitution.

3. Under the Cooperative Law of 16 September 1982 (Journal of Laws, Number 30, Item 210), citizens wishing to conduct economic activity in common and, at the same time, provide certain social and educational services to members in order to improve their well-being and cultural status may associate in cooperatives (article 1). As is manifest, cooperatives are a form of realization of the constitutional freedom of association laid down in article 84 of the Constitution and made specific in the Cooperative Law. Cooperatives are basic organizational structures directly serving citizens to realize their right of association. At the same time and with the help of the same organizational structures, citizens may implement the freedom of economic activity guaranteed to them by article 6 of the Constitution.

The 1982 act also provides for the opportunity to establish a second tier of organizational structures within the cooperative movement, namely unions of cooperatives and central unions of cooperatives. The members thereof are not citizens but cooperatives acting as legal persons. From a formal point of view, in light of articles 4 and 240 of the Cooperative Law, unions of cooperatives are formed at the initiative of cooperatives and pre-existing unions, while membership in them is voluntary. The purpose of the unions, under article 240, paragraph 2 of the Cooperative Law, is to provide member cooperatives with assistance in their constitutional activities. It is left to be decided whether unions of cooperatives – as second-tier organizations – are covered by the constitutional freedom of association.

The Constitutional Tribunal believes that article 84 of the Constitution does not have to be interpreted literally, which would lead to the conclusion that the freedom of association applies only to organizations whose members are natural persons. It is the opinion of this Tribunal that the freedom of association also covers second-tier organizations because they also come into being at the will of citizens who join first-tier organizations. This will may be manifested in different ways, e.g. by resolutions adopted by members of first-tier organizations or by giving consent to join a first-tier organization when a prospective member knows that the said organization is a member of a second-tier organization.

A general statement that second-tier cooperative organizations are covered by the constitutional freedom of association does not prevent an investigation into whether specific kinds of second-tier cooperative organizations and regulations, pursuant to which they operate, conform with articles 6 and 84 of the Constitution.

(...) 5. The Sejm has critically evaluated the activities of existing unions despite a formal declaration of freedom of association within the cooperative movement made in the amended Act dated 1982 on Cooperatives and Their Unions. The grounds for the critical evaluation were the hitherto existing manner of establishment and activity of unions and the impact exerted by them and the Supreme Cooperative Council on cooperatives. The existing unions of cooperatives, especially central unions of cooperatives, were adapted to the centrally planned economy. Statutorily entitled (article 244 of the Cooperative Law) to conduct business, they became financially independent of member cooperatives and – what's more – they could exert extensive pressure on first-tier cooperatives. The instruments of pressure by a central union on cooperatives were article 39, paragraph 2, sub-section 2, and article 40, paragraph 2 empowering a central union to obligate the management board of a cooperative to call a general meeting and to amend its agenda. Another instrument of pressure was a centralized development fund, set up pursuant to article 76 of the Law, operated by the central

union and consisting of contributions from member cooperatives. The fund was set up pursuant to a resolution adopted by a congress of delegates of the central union. Formally, the fund was to be used for providing assistance to cooperatives and financing projects facilitating their operations. Owing to the fact that – in accordance with article 76, paragraph 2 amended in 1987 – it was the central union that managed the fund, it could exert extensive pressure on cooperatives. This principle was confirmed by article 168, paragraph 2 and by amended article 208, paragraphs 5 and 5a concerning housing cooperatives.

In addition to the previous provisions, other provisions of the law gave central unions powerful instruments for exerting pressure on cooperatives such as: article 241, paragraph 1, sub-section 1, (giving advice to cooperatives), article 241, paragraph 1, sub-section 2, (initiating and supporting cooperation among cooperatives), article 241, paragraph 1, sub-section 3, (lobbying on behalf of member cooperatives with state and administrative bodies), article 241, paragraph 1, sub-section 4, (drafting and reviewing bills concerning member cooperatives), article 241, paragraph 1, subsection 6, (providing material and organizational support to newly established cooperatives), article 241, paragraph 1, sub-section 7, (initiating and assisting member cooperatives in foreign collaboration).

Furthermore, all unions (not only the central ones and the Supreme Council) could delegate their representatives in an advisory capacity to a general meeting of any member cooperative (article 36, paragraph 4).

The legal and factual means (e.g. access to goods in short supply) for unions to exert pressure on member cooperatives caused the principle of self government laid down in article 1 of the Cooperative Law and, consequently, the constitutional freedom of economic activity proclaimed in article 6 of the Constitution to be largely abridged even after 1987. It was then that cooperatives were formally given more freedom by the Act Amending Certain Acts Regulating the Operating Principles of the National Economy (Journal of Laws, Number 33, Item 181).

To conclude, it must be observed that article 1, section 1 of the Act dated 20 January 1990 on Amendments to the Organization and Activities of Cooperatives challenged in the Supreme Cooperative Council's petition, which placed those cooperative unions that existed at the time when the Act came into force in liquidation, does not contravene articles 6 and 84 of the Constitution.

6. As far as article 19, section 1 of the questioned Act is concerned, it must be said that this provision, by enacting that until a new statutory regulation is passed provisions of a part of the Cooperative Law were not to be applied, prevented the establishment of new unions of cooperatives from the time the Act dated 20 January 1990 came into force until 31 July 1991. Thus, at that time it was impossible to establish new unions of cooperatives even by a grassroots effort and in a democratic manner at the initiative of cooperative members. It is the belief of this Tribunal that the setting up of second-tier organizational structures is also covered by the civil freedom of association, provided that these structures do not restrict the independence of first-tier organizations and do not contravene articles 6 and 84; section 3 of the Constitution. Therefore, the Constitutional Tribunal states that even a temporary suspension of the possibility to establish unions of cooperatives violates the civil freedom of association. Consequently, article 19, section 1 of the Act contravenes in this respect article 84, section 1 of the Constitution. As far as the remaining part is concerned, where article 19, section 1, says that until 31 July 1991 the provisions of the Cooperative Law concerning inspection (articles 91-95) and the remaining provisions of this part of the said Law are not to be applied, one has to share the view of the Prosecutor General that the said provision is a

consequence of placing existing unions of cooperatives in liquidation. The purpose was to protect cooperatives against the interference of the unions placed in liquidation.

The derogated provisions regulated the legal effects of the existence of unions of cooperatives in the form given to them by the provisions issued in the centralized economy period, most recently by the Act dated 16 September 1982 entitled Cooperative Law. As indicated previously, the attachment of certain legal effects to specific organizational forms and their amendment by the lawmaker, especially in relation to business transactions, falls within the competence of the regular lawmaker and such legislative activity does not violate the freedom of association of citizens guaranteed by article 84 of the Constitution. They may continue to conduct joint organized economic activity. However, this activity will not bring about the legal consequences defined in the derogated provisions. This corresponds to the principle formulated in article 6 of the Constitution, according to which a restriction of economic activity is admissible, provided it is introduced by statute. As far as newly established unions are concerned, their activities could be regulated by articles of association or agreements drawn up and adopted by cooperatives joining such unions. However, such articles of association or agreements would be binding only on the cooperatives joining a union and would not be effective with respect to third parties.

This is why the remaining part of article 19, section 1 of the Act dated 20 January 1990 on Amendments to the Organization and Activities of Cooperatives (Journal of Laws, Number 6, Item 36) does not contravene articles 6 and 84 of the Constitution.

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