

Judgment

dated 17 March 1998 (U. 23/97)

The Constitutional Tribunal's sitting with the bench composed of the Chairman Błażej Wierzbowski, Judge Jadwiga Skórzewska-Łosiak and Janusz Trzeciński (Reporting Judge).

(...)

held

that the Regulation issued by the Minister of National Education dated 19 March 1997 in the matter of teacher compensation (Journal of Laws, Number 29, Item 160) is not inconsistent with article 4, section 2 of the Teacher's Charter Act dated 26 January 1982 (uniform text, Journal of Laws, 1997, Number 56, Item 357), whereby it conforms with article 7 of the Constitution of the Republic of Poland dated 2 April 1997 (Journal of Laws, Number 78, Item 483).

Reasoning

(...)

III

(...)

As the contents of the petition indicate, the procedure for agreeing upon an increase in compensation within the framework of the Tripartite Commission is treated by the applicant as the fulfillment of the duty of agreeing upon the executive order to the Teacher's Charter with the trade unions as envisaged in article 4, section 2 of the Teacher's Charter, i.e. the regulation concerning teacher compensation, while the departure from the contents of the Commission's findings is treated as an infringement upon article 4, section 2.

The prior verification of the hypothesis set forth in the petition about the identity of the agreement proceedings conducted within the framework of the Tripartite Commission should be the initial issue on one hand while agreements with the trade unions pertaining to the contents of the regulations and ordinances mentioned by article 4, section 2 of the Teacher's Charter should be considered on the other. Thus the nature of the agreement proceedings must be clarified, as must be the legal nature and the significance of the findings accepted by the Tripartite Commission on Socio-Economic Affairs.

The status of the Tripartite Commission on Socio-Economic Affairs, as established by the Resolution of the Council of Ministers Number 7/94 and dated 15 February 1994 and its powers as set forth in the Act dated 23 December 1994 on Shaping Assets for Compensation in the National Government Budgetary Sphere and in the Act dated 16 December 1994 on the System of Negotiations to Shape the Incremental Growth of Average Compensation in Business Entities and on amending some other acts were already the subject of evaluation by the Constitutional Tribunal. In its decision dated 6 May 1997 (ref. no. U. 2/96) the Tribunal, reviewing the nature of the challenged Resolution of the Council of Ministers, Number 7/94, in the matter of establishing the Tripartite Commission to Socio-Economic Affairs, also spoke out on the matter of the legal nature of the Tripartite Commission, its powers and the binding force of its findings. According to the viewpoint expressed by the Tribunal: „The resolution constitutes an element whereby the governance and creation of law induce wider societal involvement in an area associated with socio-economic issues which are important to employees, employers and the government. By establishing the Tripartite Commission the resolution formalized opinion-giving in a certain sphere and consultations by the government

on certain issues linked to the performance of socio-economic policy as well as the course and the control of economic processes... The resolution therefore established an auxiliary body to the Council of Ministers to agree upon these issues. The nature of the Tripartite Commission as an auxiliary and opinion-giving body of the Council of Ministers further emphasizes the fact that this body has no decision-making powers... The introduction of the Tripartite Commission to the stipulations set forth in statutes and endowing it with certain powers, even binding ones, by the power of these statutory regulations, has not, however, altered the legal nature of this body's operation nor its powers with respect to the scope regulated in the challenged resolution. The Commission continues to operate within the framework of the government's powers, for its powers make reference to the budget projection phase. The Commission may negotiate and postulate certain solutions which refer only to the draft version of the budget. The Government is obliged to take into consideration the Commission's agreements in the draft version of the Budgetary Act. At the same time, however, these proposals may be adjusted by the parliament as a result of debate and voting on the Budgetary Act... The solution envisaged by the challenged resolution, in tandem with the solutions of both statutes, envisaging the opportunity to negotiate within the framework of the Tripartite Commission do not supercede... the existing institutions of labor law or legislation on trade unions nor do they curtail the trade unions' current powers in any way whatsoever. The Tripartite Commission does not speak out on issues specifying the rights and duties of trade unions, but it does express an opinion on issues of a general nature with substantial significance for society. On one hand this enables government institutions to familiarize themselves with the opinion presented by the trade unions while on the other hand it allows the trade unions to be involved in the decision-making process with respect to the living standard of various groups in society" (Decision dated 6 May 1997, ref. no. U.2/96, Collection of the Constitutional Tribunal's Decisions, ZU Number 2/97, pp. 136-137).

With the role of the Tripartite Commission and the nature of its findings having been defined in the foregoing fashion it is manifest that these findings cannot be a benchmark for evaluating whether the Minister of National Education has met the duty stemming from article 4, section 2 of the Teacher's Charter. These findings refer to another issue - solely to the state budget projection and concern, in keeping with the title of the Act, the shaping of *assets* for compensation in the national government budgetary sphere. They do not supercede - as the Tribunal asserted - any existing institutions of labor law nor the powers of the trade unions as envisaged in statutory provisions. If the Commission agrees upon the amount of the projected mean compensation, the Council of Ministers is charged with the duty of incorporating assets in the draft version of the budgetary act to ensure the attainment of the amount of compensation specified. This is a fundamental and in essence the sole legal duty imposed upon the Council of Ministers after the completion of the agreement proceedings envisaged in article 4 of the Act on Shaping the Assets for Compensation. It is the parliament, however, which makes the final decision on whether the proposals negotiated within the framework of the Commission shall be incorporated in the budgetary act.

2. The phrases „in consultation”, „in agreement”, „with the consent”, „with the participation”, „after obtaining the opinion” etc. appear fairly frequently in the legal provisions authorizing the legislative body to establish the law. They express the bonds of interdependence between various entities where one of them is the body setting the law. In the event that these phrases are associated not only with government bodies but with entities social in nature, this fact is classified by the doctrine of law as a symptom of greater societal involvement in the process of creating the law. The usage of the foregoing notions in provisions pertaining to law-making activity denotes the features of this activity - it should take place with the cooperation of other entities besides the legislative body. With their

intermediary the lawmaker also shapes the mutual legal relationships between sundry entities. The degree to which a legislative body is bound by a specific decision made by a cooperating body should be dependent upon the selection of these phrases, just as the contents of the rights and duties of the legislative body and the cooperating entity.

This premise may be executed provided that the lawmaker uses phrases which are sufficiently austere, or if it also makes utilization of other means pointing to the importance of the concept employed, in particular by defining the legal consequences of failing to cooperate when making law. The fact that the lawmaker frequently uses specific linguistic phrases with meanings which are not always sufficiently defined and which are not always consistently perceived in legal literature (e.g. S. Wronkowska, M. Zieliński, *Problemy i zasady redagowania tekstów prawnych* [The Problems and Principles of Editing Legal Texts], Warsaw 1993, p. 68).

The usage itself of the formulations pointed out without more closely defining the contents of the rights and duties of the legislative body and the organizations (bodies) co-participating in the lawmaking process also yields certain difficulties associated with the way in which this co-participation is carried out in practice. The Constitutional Tribunal has encountered this problem numerous times when formally reviewing statutes based on the allegation that the statutory path for issuing a normative act has been violated (e.g. in matters with the following file numbers U. 3/86, U. 4/86, U.12/92, K.14/92, K.18/92, K.10/94 or even K. 7/95) formulating in particular that when the form of co-action is discussed in the form of „expressing an opinion”, as well as the contents of the duties incumbent upon the legislative body.

(...) The regulations set forth in the Rules of Legislative Methodology (paragraphs 53 and 54) constituting an attachment to Resolution Number 147 of the Council of Ministers dated 5 November 1991 in the matter of the rules of legislative methodology (Monitor Polski, Number 44, Item 310) should be seen as an attempt to rationalize the state of affairs indicated here which moves towards putting order and defining more concretely the concepts concerning co-participation in law making. The addressee of these rules are, however, only the State's supreme and central bodies as well as other units reporting to the Council of Ministers and the President of the Council of Ministers, and not the Sejm. According to § 54, sub-section 2 of the foregoing Rules the provision authorizing co-participation in issuing a normative act should read as follows „...in agreement with”, or „... in consultation with” in those instances if co-participation is to rest upon attaining an understanding in the matter of the contents of a statute while the consequences of failing to reach an agreement is for the statute not to become effective. The foregoing directive set forth in the rules may constitute the basis to determine the lawmaker's intentions provided that, however, the draft version comes from the body obliged to abide by these rules. This condition does not refer to article 4, section 2 of the Teacher's Charter Act dated 26 January 1982. Its contents were not incorporated in the governmental draft of this Act, but were formulated and appended by the Sejm itself. Moreover, the foregoing Rules of Legislative Methodology have only been in force since 1992.

3. Article 4, section 2 of the Teacher's Charter („The Regulations and Ordinances... are subject to agreement with the trade unions...”) most certainly refers to the co-participation of the trade unions in the law making process. The term used therein, viz. „agreement”, in keeping with its linguistic sense, is supposed to denote an activity resting upon „bringing about the absence of discrepancies”, „standardizing” or even „harmonizing” (in the meaning of „mutually adapting” - *Słownik języka polskiego* [Dictionary of the Polish Language] ed. M. Szymczak Warsaw 1978, p. 642). Albeit true, one of the meanings of this term boils down to

„mutually expressing consent to something” (as above), but the lawmaker when construing this form of co-participation by the trade unions in the law making process places emphasis not on the effect of the agreement in obtaining consent but rather on the fact of agreeing upon things, on the process itself of working out this consent; standardizing or even mutually adapting (harmonizing) one another’s stances to each other. The inclusion of the word „are subject to” before the concept under consideration is proof positive of the foregoing. This signifies first and foremost that the duty of submitting the contents of executive orders to primary legislation to the agreement procedure has been imposed upon the Minister of National Education in order to develop a joint stance. (...)

(...) the authors of drafts, inserting the depicted concept in the contents of a draft version were aware that „agreement” may not always signify total and universal consent between the legislative body and all the entities participating in the process of establishing a normative act on all the solutions of the statute, but it must signify the subjection of the contents of the established acts to the formalized agreement procedure with the entities entitled to this form of participation in the process of establishing a normative act in order to achieve it. The instrument of this procedure should be statements of agreement, as well as statements of discrepancy if consent is absent for the contents of a statute’s solutions. For achieving consent is dependent upon not only the will of the parties but also other factors external to their will. This manifests itself with particular explicitness in reference to the contents of the normative act concerning compensation, whose amount is shaped by the assets envisaged in the budget, where further taking into account the form of the budget, nonconformity in the contents of the regulation in the matter of compensation with the contents of the Budgetary Act would have to be classified in the categories of illegality. For a regulation should be consistent not only with the statute on the grounds of which it was issued but also with the contents of other statutes.

The Tribunal did not share the view of the Minister of National Education that agreement „signifies giving an entity co-acting with the body establishing a normative act certain powers in the area of establishing law, naturally along with the acceptance of co-accountability for the normative act issued” (p. 3 of the letter). According to the Tribunal, neither the formula „in consultation” nor the formula „in agreement” used in the provisions concerning the establishment of normative acts leads one to the hypothesis that the entity entitled to these forms of co-participation acquires thereby the power to establish the law and that it is co-accountable for the normative act issued. Powers, in particular the nature of the lawmaking power, cannot be presumed. This conviction is further supported by the fact (which has been perceived by the Minister) that the binding Constitution of the Republic of Poland, in accepting a closed system of the sources of law, defines in a fairly strict manner the circle of entities outfitted with lawmaking powers. And only these entities, i.e. state bodies, are accountable for the contents of normative acts, whether in the form of political or even constitutional accountability.

The co-participation of specific entities present in the forms indicated, refers to the shaping of the contents of normative acts at the stage of preparatory work before a statute is issued. It assumes not only the duty of the legislative body to provide information about the draft version of the legislative decision but also discussion about the substantive contents of this draft version, the opportunity to present various stances, attempts to standardize them and to mutually adapt them to the expectations of the partners in this discussion - finally working out the final law giving a decision which is to be held in common and to be the optimum one in so far as it is possible. The influence of the partners assumed in this form of co-participation and exerted on the contents of the lawmaking act necessitates that, if

discrepancies arise regarding the solutions and the necessity of adopting the version presented by the drafter, this necessity be sufficiently motivated.

Complete consent to the solutions embodied in a draft version of a normative act is only one of the opportunities in the process of agreeing upon the contents of a normative act, since its attainment may remain, as has been demonstrated, beyond the will of the entities participating therein (e.g. binding the Minister by the stipulations of the budget). The condition of achieving it as a prerequisite for the binding force of a given normative act would also erase the differences between co-participation in the lawmaking process and co-creation in the form of issuing a common normative act by two entities provided with legislative powers, or the construction envisaged in § 54, sub-section 3 of the Rules of Legislative Methodology expressed in legal provisions with the term „after approval by.” Article 4, section 2 of the Teacher’s Charter does not envisage the issuance of the Minister’s regulation in tandem with the trade unions nor does it make the issuance thereof dependent upon their approval.

4. On the grounds of the documents presented by the Minister of National Education the Constitutional Tribunal ascertained that the contents of the Regulation issued by the Minister of National Education dated 19 March 1997 in the matter of teacher compensation were agreed upon with trade unions whose members are teachers and thus the duty described in article 4, section 2 of the Teacher’s Charter had been fulfilled.

(...)