2004/10/20 - PL. ÚS 52/03: LABOR LAW DEGREE

HEADNOTES

In terms of defining parties and secondary parties to proceedings, the Act on the Constitutional Court is based on the principle of legality, i.e. the entities in question receive their status directly from the Act. Therefore, the Constitutional Court could not add the union to the proceedings as a secondary party. This procedural position for a trade union as an association of interests in which the economic and social interests of a certain group of employees are institutionalized, is barred by the very substance of proceedings on annulment of statutes and other legal regulations. Undoubtedly, trade unions, just like associations of employers in particular sectors of the economy, have an important role in a modern state in terms of the representation and aggregation of various interest and demands, which do not always find a platform in other institutions typical of parliamentary democracy. On the other hand, it must be respected that the circle of persons who by law have the status of parties or secondary parties to proceedings was chosen by the legislature so that it would, to a certain extent, reflect the principles on which the constitutional order of the CR is constructed (that is, above all the principle of democratic legitimacy of state bodies, the principle of separation of powers and protection of minorities), and so as to correspond to the subject matter of proceedings (i.e., evaluation of the consistency of legal regulations with the constitutional order of the CR). These principles are matched by the statutory definition of the circle of parties and secondary parties to proceedings on annulment of statutes and other legal regulations. Expanding parties or secondary parties by other entities – e.g., political parties, interest groups, etc. – would be inconsistent with the abovementioned principles, on which the state authority and political system in the CR are constructed, and they would be expressions of principles which are typical of political systems on different models (e.g. neo-corporativism or a consotional model of democracy.

State authority in the CR is based on a certain concrete model of the separation of powers. One of the key areas in which the principle of separation of powers is reflected is the sphere of dividing norm-creating authority between the legislative and executive branches. In the Constitutional Court's opinion, authority and jurisdiction must be distinguished. The authority of a state body must be understood as the exercise of state authority in an appropriate form (i.e., in the form of norm creation or individual decision making), while jurisdiction is the quite specific substantive definition of issues regulated in the process of exercising authority. Art. 79 par. 3 of the Constitution of the CR must be interpreted from this point of view, to the effect that the authority of ministries and other administrative bodies, or local government bodies, to issue derived secondary legal regulations is based on Art. 79 par. 3 of the Constitution of the CR. This is a legal norm which, on a general level, establishes the authority of executive branch bodies to create secondary legal norms on the condition that the exercise of that authority is specified more closely in a statute in relation to a particular jurisdiction (a certain statutorily defined component of the exercise of state authority). The authority of the executive to issue sub-statutory legal norms is established directly in the Constitution of the CR, not in a statutory framework. The

statutory authorization which corresponds to the requirements in Art. 79 par. 3 of the Constitution of the CR, is then fulfillment of that authority in terms of scope and content (jurisdiction).

The reason for establishing this authority directly in the Constitution of the CR is the fact that this concerns the crucial question of separation of powers between the legislative and executive branches in norm creation. The ultimate consequence of this would be that if the norm creation authority of the executive branch were constituted only by statute, it would be at the disposal of the legislature, whereby the legislative branch could, by itself, interfere in the authority of the executive branch, for example, by taking such authority completely away from the executive branch. However, the concept contained in the Constitution of the CR assumes that the legislature does not create this authority through ordinary statutes; on the contrary, the Constitution of the CR only gives the legislature the ability to authorize the executive branch, in a specific case, to exercise the authority in the form of specific jurisdiction. A particular executive body is then required to exercise this jurisdiction (in the sense of substantive definition of issues regulated in the process of exercise of authority) on the basis of and within the bounds of the statute which authorized it to create a secondary legal norm. The fact that such delineation of powers sets limits for bodies of both the executive branch and the legislative branch corresponds to the principle of separation of powers.

CZECH REPUBLIC

CONSTITUTIONAL COURT

JUDGMENT

IN THE NAME OF THE CZECH REPUBLIC

The Plenum of the Constitutional Court, composed of justices ve složení JUDr. Stanislav Balík, JUDr. František Duchoň, JUDr. Vojen Güttler, JUDr. Pavel Holländer, JUDr. Ivana Janů, JUDr. Dagmar Lastovecká, JUDr. Jiří Mucha, JUDr. Jan Musil, JUDr. Jiří Nykodým, JUDr. Pavel Rychetský, JUDr. Miloslav Výborný, JUDr. Eliška Wagnerová a JUDr. Michaela Židlická, decided on a petition from a group of deputies of the Chamber of Deputies of the Parliament of the CR seeking the annulment of Ministry of Labor and Social Affairs decree no. 405/2003 Coll., which annuls decree no. 19/1991 Coll., on work placement and material security for mining workers with long-term incapacity for their previous work, with the participation of the Ministry of Labor and Social Affairs as a party to the proceedings :

I. The petition to annul Ministry of Labor and Social Affairs Decree no. 405/2003 Coll., which annuls Decree no. 19/1991 Coll., on Work Placement and Material Security for Mining Workers with Long-term Incapacity for their Previous Work, is denied.
II. The petition to permit the participation of the Union of Mining, Geology and Petroleum Industry Workers as a secondary party is denied.

REASONING

In the petition, which was delivered to the Constitutional Court on 19 December 2003, a group of 40 deputies of the Chamber of Deputies of the Parliament of the CR sought the annulment of Ministry of Labor and Social Affairs Decree no. 405/2003 Coll., which annuls Decree no. 19/1991 Coll., on Work Placement and Material Security for Mining Workers with Long-term Incapacity for their Previous Work.

As the petitioners stated, § 1 par. 1 of the contested decree annulled decree no. 19/1991 Coll., which was issued by the Federal Ministry of Labor and Social Affairs of the CSFR on the basis of authorization in § 148a and § 275 par. 1 let. b) of Act no. 65/1965 Coll., the Labor Code, in the version in effect until Act no. 74/1994 Coll. entered into effect.

Under Art. I point 95 of Act no. 74/1994 Coll., which amends the Labor Code and certain other Acts, § 148a of the Labor Code was annulled, and under Art. I point 146 the wording of § 275 par. 1 was amended so that it does not contain authorization for sub-statutory legal regulation. According to the petitioners, the legislature thus made it clear that in future obligations could be established, amended, or annulled only by statute. This is a constitutional directive, which continues to be observed by the Parliament of the CR, and it is the intention of the legislature in future to keep relationships of a labor law nature on a statutory, not sub-statutory, level. Therefore, the petitioners believe, that as the legislature did not annul the decree in derogative provisions, it demonstrated thereby that it agrees with the legal framework contained therein and considers it still materially justified. According to the petitioners, the court system has decided the same way, as confirmed by, for example, the decision of the Supreme Court of the CR of 12 August 1998, file no. 21 Cdo 1798/98.

According to the petitioners, the Minister of Labor and Social Affairs nevertheless issued the contested decree under § 9 and § 24 of Act no. 2/1969 Coll., on the Establishment of Ministries and Other Central Bodies of State Administration of the CR, as amended by later regulations (the “Establishment Act”), without being authorized to do so by statute. None of the abovementioned statutory provisions can be considered to authorize the issuance of a sub-statutory legal regulation.

The Constitution of the CR provides in Art. 79 par. 3 that ministries and other administrative bodies and local government bodies can issue legal regulations on the basis of and within the bounds of a statute, if they are authorized to do so by statute. According to the petitioners, the legal order does not include any statute which would generally

authorize ministries to issued generally binding legal regulations. No such authorization is contained in either § 9 or § 14 of the Establishment Act.

Thus, according to the petitioners, the legal order does not contain any statute which would contain an authorization to issue the decree, even if it were a decree which contained only annulment provisions. If there were material reasons for annulling a decree, that could be done only by statute.

The petitioners expressed a belief that the ministry's actions are grossly inconsistent with the legal order, because a valid implementing regulation issued on the basis of a no longer existing authorization can not be annulled in any other way than by statute. Therefore, they proposed that the Constitutional Court annul the entire contested decree.

Proceedings on the petition were suspended by decision of the Plenum of the Constitutional Court of 23 March 2004 due to the Constitutional Court not having enough members. The obstacle to reviewing the petition was removed on 16 June 2004, when the president named a twelfth judge to the Constitutional Court. Therefore, after that date the Constitutional Court continued the proceedings and, under § 69 par. 1 of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations (the "Act on the Constitutional Court"), requested a statement from the Ministry of Labor and Social Affairs of the CR.

In its statement of 26 July 2004 the Ministry of Labor and Social Affairs (the "MLSA") summarized the reasons which led to issuing the contested decree. According to the MLSA they were primarily constitutional law reasons arising from Art. 2 par. 4 of the Constitution of the CR and Art. 2 par. 3 of the Charter of Fundamental Rights and Freedoms (the "the Charter"). The Charter provides that everyone may do that which is not prohibited by law; and nobody may be compelled to do that which is not imposed upon him by law. Under Art. 11 par. 4 of the Charter expropriation or some other mandatory limitation upon property rights is permitted in the public interest, on the basis of law, and for compensation. Art. 79 par. 3 of the Constitution of the CR provides that if they are so empowered by statute, the ministries, other administrative offices, and bodies of territorial self-governing units may issue regulations on the basis of and within the bounds of that statute.

In this regard the MLSA also pointed to Constitutional Court judgment file no. Pl. ÚS 45/2000, under which the constitutional definition of the derived norm-creation by the executive rests on the following principles: another legal regulation must be issued by an authorized body, it may not interfere in matters reserved to statute (thus, it can not set forth primary rights and obligations), and it must indicate the clear intent of the legislature for regulation to exist above the statutory standard (space must be open for the sphere of another legal regulation).

Decree no. 19/1991 Coll., issued before the passage of the Constitution of the CR and the Charter, on the basis of now annulled authorization provisions contained in the Labor Code, did not meet the cited constitutional norms or the cited legal opinion of the Constitutional Court, because it imposed on mining employers, beyond the framework and the bounds of the statutory framework, an obligation to provide their employees above-

standard labor law entitlements out of their own funds and to fulfill other obligations set forth by the decree.

Thus, decree no. 19/1991 Coll. was inconsistent with the abovementioned constitutional norms, which define the constitutional boundaries for the possibility of lawful imprisonment and ownership rights, and thus with the constitutional order and the laws of the CR. It is contrary to the principles of a democratic, law-based state for a framework which, in view of its substance and gravity of impact on employers, should be regulated directly by statute, to be applied on the basis of implementing regulation which was issued during the period of central management of state companies (the decree replaced with effect as of 1 February 1991 a similar Federal Ministry of Labor and Social Affairs decree, no. 102/1987 Coll.).

The MLSA also stated that under the annulled decree employers in the mining industry were required to provide severance pay in the amount of 1 to 14 times average monthly earnings out of their own funds to certain specified employees, although at the time the statutory bounds of providing severance pay were governed at the time of the decree by § 60a of the Labor Code so that employees were entitled to severance pay only upon termination of employment, in an amount of twice the average earnings. This severance pay could by increased by additional multiples of average earnings by a collective bargaining agreement or internal regulation.

In connection with annulment of decree no. 19/1991 Coll., and in accordance with the amended § 60a par. 2 of the Labor Code, appropriate amendments to collective bargaining agreements were concluded in individual mining companies, which governed the provision of severance pay in cases of termination of employment on health grounds.

Under the annulled decree, employers in the mining industry were required to provide to employees with incapacity for their previous work wage equalization out of their own funds, in the amount of the difference between their average gross earnings before transfer or severance of employment and the gross earnings received at their new place of employment. The statutory bounds of providing wage entitlements are defined by Act no. 1/1992 Coll., on Wages, Compensation for Work Standby and Average Earnings, as amended by later regulations. As regards the bounds of applying an implementing regulation in these cases, § 8 par. 3 of Act no. 1/1992 Coll. authorizes the government to set by directive only under what conditions the appropriate state administration body will pay expenses for any wage supplementation to the employer that provided it. However, neither Act no. 1/1992 Coll. nor any other act permits an implementing regulation to establish an employers' obligation to provide wage equalization (a wage supplement) in other cases, in particular in cases which were set forth by § 7 of decree no. 19/1991 Coll.

Employers in the mining industry were also required, without any basis in law, certain special obligations, which no statute imposed on them, vis-à-vis a circle of employees under decree no. 19/1991 Coll. They were thus required to transfer those employees to other suitable work, and were required to ensure that they be given an opportunity to re-qualify under special regulations, and to discuss the possibility of employment in different work after re-qualification.

Thus, one can generally say, according to the MLSA, that in these cases the annulled decree no. 19/1991 Coll. replaced a statutory framework in an impermissible way, and that by issuing it and leaving it in effect even after passage of the Constitution of the CR the executive branch appropriated an authorization which, under Art. 2 par. 4 of the Constitution of the CR and Art. 2 par. 3 of the Charter, belongs exclusively to the legislature. Therefore, the MLSA took the step of annulling the decree.

Decree no. 19/1991 Coll. was issued on the basis of authorization contained until 31 May 1994 in § 148a and § 275 par. 1 let. b) of the Labor Code. After passage of the Constitution of the CR and of the Charter, both these authorizations were annulled by Act no. 74/1994 Coll. The legislature did this in view of the need to observe the constitutional principle that nobody may be compelled to do that which is not imposed upon him by law, and by annulling these authorizations it ensured that the executive branch no longer had the authority to impose the abovementioned obligations on employers in the mining industry. However, the executive branch did not annul decree no. 19/1991 Coll., even though it was clearly inconsistent with Art. 2 par. 4 of the Constitution of the CR, Art. 2 par. 3 of the Charter and Art. 79 par. 3 of the Constitution of the CR, apparently because of fears that such a step would be poorly received by mining industry employees. Therefore, decree no. 19/1991 Coll. was not annulled until the contested decree no. 405/2003 Coll.

The MLSA prepared the annulling decree in accordance with Art. 10 par. 3 of the Legislative Rules of the Government of the CR, under which "If a draft act proposes repealing an act, or part of it, to which an implementing regulation has been issued, the annulling provisions of the draft act shall also propose annulling that legal regulation. If, before this procedure is applied, the legal order contains an implementing regulation that was issued on the basis of the already annulled authorization provision, the following procedure is followed: if the issued regulation is a decree, it shall be annulled by a decree, the introductory sentence of which shall set forth the relevant section of the Act on Establishment of Ministries and Other Central State Administration Bodies." Therefore, decree no. 405/2003 Coll. cites § 9 and § 24 of the Establishment Act.

As regards the earlier decision by the Supreme Court of the CR concerning decree no. 19/1991 Coll., to which the petitioners refer, it did not, according to the MLSA, say that the decree is consistent with the constitutional order, but merely said that the decree is a valid component of the legal order, i.e., that it was issued in the prescribed manner, and that it must be followed until such time as it is annulled in the prescribed manner in accordance with the legal order. In no event did the Supreme Court of the CR cast doubt on the right of the ministry to annul decree no. 19/1991 Coll., nor, in view of the principles for the functioning of a law based state, could it have done so.

The Constitutional Court, under § 69 par. 2 of the Act on the Constitutional Court, sent the petition to the ombudsman, asking him to state by the statutory deadline whether he was entering the proceedings as a secondary party. By official letter of 13 July 2004 the ombudsman expressed his intent not to enter the proceedings.

By a filing of 2 September 2004 the petitioners informed the Constitutional Court that they wished to have a hearing before the Plenum of the Constitutional Court.

In a hearing held on 20 October 2004, the petitioners expanded the arguments contained in the written petition, adding that by annulling the decree the MLSA violated the principle of protection of acquired rights. At the hearing, the MLSA representative said that the grounds for annulling the decree can be divided into two spheres. One sphere is constitutional law grounds, which the MLSA discussed in its statement on the written petition; the second sphere is the fact that the Czech Republic has joined the European Union. According to information available to the MLSA, maintaining this above-standard performance guaranteed by the decree would considerably burden the competitiveness of companies that hire these employees, in the European context.

II.

The Constitutional Court first stated that the petition was filed by an authorized entity in accordance with § 64 par. 2 let. b) of the Act on the Constitutional Court (in this case by a group of 40 deputies, as the signature of one the named petitioners is missing at the end, that of JUDr. Z. R., a deputy of the Chamber of Deputies) and it is a permissible petition (§ 66 of the Act on the Constitutional Court a contrario).

However, the Constitutional Court points out that it did not grant the petition for the Union of Mining, Geology and Petroleum Industry Workers to be added to the proceedings as a secondary party. Under § 28 par. 1 of the Act on the Constitutional Court, parties to proceedings before the Constitutional Court are the petitioner and those specified by the Act on the Constitutional Court. Also, secondary parties to proceedings are, under § 28 par. 2 of the Act on the Constitutional Court, only those to whom the Act on the Constitutional Court grants such standing. In proceedings to annul statutes and other legal regulations (abstract review of norms), a party to the proceedings is the entity that issued the contested legal regulation, and the ombudsman may be a secondary party in proceedings to annul other legal regulations, if he so chooses by the statutory deadline.

Therefore, in terms of defining parties and secondary parties to proceedings, the Act on the Constitutional Court is based on the principle of legality, i.e. the entities in question receive their status directly from the Act. Therefore, the Constitutional Court could not add the union to the proceedings as the group of deputies proposed. This procedural position for a trade union as an association of interests in which the economic and social interests of a certain group of employees are institutionalized, is barred by the very substance of proceedings on annulment of statutes and other legal regulations. Undoubtedly, trade unions, just like associations of employers in particular sectors of the economy, have an important role in a modern state in terms of the representation and aggregation of various interest and demands, which do not always find a platform in other institutions typical of parliamentary democracy. On the other hand, it must be respected that the circle of persons who by law have the status of parties or secondary parties to proceedings was chosen by the legislature so that it would, to a certain extent, reflect the principles on which the constitutional order of the CR is constructed (that is, above all the principle of democratic legitimacy of state bodies, the principle of separation of powers and protection of minorities), and so as to correspond to the subject matter of proceedings (i.e., evaluation of the consistency of legal regulations with the constitutional order of the CR). These principles are matched by the statutory definition of the circle of parties and

secondary parties to proceedings on annulment of statutes and other legal regulations (§ 64 of the Act on the Constitutional Court). Expanding parties or secondary parties by other entities – e.g., political parties, interest groups, etc. – would be inconsistent with the abovementioned principles, on which the state authority and political system in the CR are constructed, and they would be expressions of principles which are typical of political systems on different models (e.g. neo-corporativism – for definition of the term see, e.g., Schubert, K.: Interessenvermittlung und staatliche Regulation. Opladen, Westdeutscher Verlag 1989 – or a consotional model of democracy – see, e.g. Lijphart, A.: Consotional Democracy. World Politics, No. 2/1969, p. 207 - 225, in Říchová, B. Lisa, A. (ed.): Antologie světových politologů [Anthology of World Politologists]. Prague, VŠE 1995, p 9-32.).

The fact that a trade organization or union does not have and can not have the status of a secondary party in proceedings on annulment of statutes and other legal regulations does not prevent the Constitutional Court for asking it for a statement as part of presentation of evidence. However, in this case the Constitutional Court considered it superfluous because – as will be come evident – the subject matter for review by the Constitutional Court was not the issue of social and economic rights of a certain circle of employees, to which the jurisdiction of the annulled decree applied, but primarily the issue of the scope of authority and jurisdiction and the issue of the relationship between the legislative and executive branch in connection with derived norm creation.

In view of these facts, the Constitutional Court denied the petition to permit the participation of the Union of Mining, Geology and Petroleum Industry Workers as a party to the proceedings.

III.

A) Under § 68 par. 2 of the Act on the Constitutional Court, it is the task of the Constitutional Court in proceedings on the constitutionality of statutes and other legal regulations to evaluate whether the content of a contested regulation is consistent with the constitutional order of the CR, and to determine whether it was issued within the bounds of constitutionally provided jurisdiction and in a constitutionally prescribed manner.

The petitioner's petition contests Ministry of Labor and Social Affairs decree no. 405/2003 Coll., under which, with effect as of 1 December 2003, Federal Ministry of Labor and Social Affairs decree no. 19/1991 Coll. was annulled. Decree no. 19/1991 Coll. was issued on the basis of statutory authorizations contained in § 148a and § 275 par. 1 let. b) of the Labor Code, in the wording in effect until the coming into effect of Act no. 74/1994 Coll., which annulled the statutory authorization to issue the decree.

In this case the issue of the content of the contested legal regulation, which only led to annulment of decree no. 19/1991 Coll., coincides with evaluation of whether the MLSA issued the contested decree within the bounds of its authority and jurisdiction, that is,

whether the ministry's actions are constitutional, when by the contested decree it annulled the previous decree in a situation where the authorizing statutory provision, on the basis of which the previous decree had been issued, was annulled by the legislature.

In their petition, the petitioners raised a more general issue, whether the ministries and other administrative offices have derived (secondary) norm creating authority to annul a previous sub-statutory legal regulation in a situation where the authorization to enact the original sub-statutory legal framework has been deleted from the statute. According to the petitioners, there is at present no statute in the legal order which would contain authorization to issue such a decree, even if it were a decree which contained only annulling provisions. According to the petitioners, a valid legal regulation issued on the basis of a no longer existing authorization can not be annulled otherwise than by statute. The petitioners thus in other words present to the Constitutional Court the opinion that the only constitutional procedure is for the legislature to authorize the executive to expressly annul secondary legal regulations or annuls such a framework itself, by statute. According to the petitioners, a different course of action, that chosen in this case by the MLSA, is inconsistent with the constitutional order of the CR.

B) State authority in the CR is based on a certain concrete model of the separation of powers (Art. 2 par. 1 of the Constitution of the CR). The Constitution of the CR constructs the relationships between the powers so that they form a complex system of checks and balances. That system is implemented in practice through various methods of legitimizing state bodies, the ways they are created, and the scope and content of the rights and jurisdictions with which state bodies are endowed. Therefore, when evaluating the scope and content of the powers of individual state bodies from constitutional law viewpoints, it is always necessary to measure them using the system of checks and balances, that is, in the wider perspective, by the principle of separation of powers.

One of the key areas in which the principle of separation of powers is reflected is the sphere of dividing norm-creating authority between the legislative and executive branches. While the legislative branch is endowed with general authority to create legal norms, in the area of norm creation the executive branch is limited by the Constitution of the CR only to the creation of derived, secondary legal regulations, if it is expressly authorized thereto by the legislative branch, and it is the legislature which sets forth the frame and content boundaries of norm creation for the executive branch.

Under Art. 79 par. 3 of the Constitution of the CR the ministries, other administrative bodies, and local government bodies may issue legal regulations on the basis and within the bounds of a statute, if they are authorized to do so by the statute.

In the Constitutional Court's opinion, authority and jurisdiction must be distinguished. The authority of a state body must be understood as the exercise of state authority in an appropriate form (i.e., in the form of norm creation or individual decision making), while jurisdiction is the quite specific substantive definition of issues regulated in the process of exercising authority. Art. 79 par. 3 of the Constitution of the CR must be interpreted from this point of view, to the effect that the authority of ministries and other administrative bodies, or local government bodies, to issue derived secondary legal regulations is based on Art. 79 par. 3 of the Constitution of the CR. This is a legal norm which, on a general level, establishes the authority of executive branch bodies to create secondary legal norms

on the condition that the exercise of that authority is specified more closely in a statute in relation to a particular jurisdiction (a certain statutorily defined component of the exercise of state authority). In other words, the authority of the executive to issue sub-statutory legal norms is established directly in the Constitution of the CR, not in a statutory framework. The statutory authorization which corresponds to the requirements in Art. 79 par. 3 of the Constitution of the CR, is then fulfillment of that authority in terms of scope and content (jurisdiction).

The reason for establishing this authority directly in the Constitution of the CR is the fact that this concerns the crucial question of separation of powers between the legislative and executive branches in norm creation. Thus, on the one hand Art. 79 par. 3 of the Constitution of the CR creates the authority of the executive branch for derived norm creation, and thus actually sets its limits in relation to the legislative branch, and on the other hand this provision must be understood to simultaneously provide protection for the executive branch from unconstitutional interference by the legislative branch. The ultimate consequence of this would be that if the norm creation authority of the executive branch were constituted only by statute, it would be at the disposal of the legislature, whereby the legislative branch could, by itself, interfere in the authority of the executive branch, for example, by taking such authority completely away from the executive branch. However, the concept contained in the Constitution of the CR assumes that the legislature does not create this authority through ordinary statutes; on the contrary, the Constitution of the CR only gives the legislature the ability to authorize the executive branch, in a specific case, to exercise the authority in the form of specific jurisdiction. A particular executive body is then required to exercise this jurisdiction (in the sense of substantive definition of issues regulated in the process of exercise of authority) on the basis of and within the bounds of the statute which authorized it to create a secondary legal norm.

In this regard we can point out that the Constitutional Court has already stated in its earlier decisions (cf. judgment Pl. ÚS 5/01, published as no. 410/2001 Coll. and others) what rules constitutional authorization for derived norm creation by the executive branch is subject to: a directive must be issued by an authorized entity, may not interfere in matters reserved to statute, and the will of the legislature for regulation beyond the statutory framework must be evident (thus, space must open for the sphere of the directive).

However, we must state that these requirements in terms of the principle of separation of powers function ambivalently so that on the one hand they set clear limits for the executive branch in secondary norm creation, and on the other hand they also determine limits for the legislature so that they create an area which – if the legislative branch creates it in terms of jurisdiction – can not be interfered with at will.

Thus, on one hand this provision limits the executive branch in relation to the legislative branch (it is actually an expression of the constitutional principle of the legitimizing function of democracy – the people – and the principle of separation of powers under Art. 2 par. 1 of the Constitution of the CR)'; on the other hand, of course, it also provides protection to the executive branch from unconstitutional interference by the legislature.

In other words, the legislature is also required to observe constitutional limits in relation to secondary norm creation by the executive branch.

If in a particular case the legislature authorizes the executive branch to implement a statute, it is impermissible, in terms of separation of powers, for the legislature then to change that legal framework itself by reserving to itself the right to make changes or by taking away the jurisdictional order and passing a new framework through primary norm creation. Otherwise, as stated above, the legislature is only authorized to set limits for the executive branch for exercise of secondary norm creation.

The fact that such delineation of powers sets limits for bodies of both the executive branch and the legislative branch corresponds to the principle of separation of powers. The Constitutional Court has stated in the past regarding this that "The Parliament of the Czech Republic, consisting of the Chamber of Deputies and the Senate, has only legislative power, and lacks executive or judicial power. The only executive power of the Chamber of Deputies lies in its ability to discipline its members or agree to their criminal prosecution; it also performs non-legislative functions consisting of the ability to establish an investigative commission for investigating matters of public interest and the ability to interview the government and its members. Thus, the Chamber of Deputies may not interfere in any way in the executive branch or in local government, with the exception of a motion for action or recommendation, etc." (cf. file no. Pl. ÚS 1/2000, published as no. 107/2000 Coll.).

The terminological identification of derived legal regulation is only a formal matter which is not determinative of legislative authority or jurisdiction. The fact that regulations issued by ministries and other administrative offices under Art. 79 par. 3 of the Constitution of the CR are not marked "decree" (§ 1 par. 2 of Act no. 309/1999 Coll., on the Collection of Laws and the Collection of International Treaties, as amended by later regulations) is irrelevant in terms of the scope and content of norm creating powers and jurisdiction.

C) The question of the "normative life" of an implementing legal regulation after the annulment of the authorizing provision in the relevant statute is not regarded uniformly in theory or practice. In one approach, the derogation of a statute implicitly annuls all legal regulations issued on its basis and for its implementation (cf. Knapp, V., Grospič, J., Šín, Z.: Ústavní základy tvorby práva [The Constitutional Bases of the Creation of Law]. Prague 1990, p. 184). Another approach comes from the thesis that the creator of a directive itself is always required to annul or amend it if it becomes inconsistent with a newly issued regulation of higher legal force (see Hendrych, D.: Správní právo, obecná část [Administrative Law, General Part]. Prague 1994, p. 33). And finally, there is the theoretical view that implementing regulations should cease to be in effect as a consequence of the annulment of the source of legal force of decrees of ministries and other central state administration bodies, i.e., the authorizing statute (Filip, J.: Ústavní právo 1. základní pojmy a instituty. Ústavní základy ČR. [Constitutional Law 1. Basic Cocnepts and Institutions. Constitutional Foundations of the CR.] MU – Supplement, Brno 1999, p. 254.). On the other hand, the theoretical view exists that mere annulment of a statutory authorization does not end the legal life of regulations issued on the basis of that authorization (Koudelka, Z.: Obecně závazné vyhlášky. [Generally Binding Regulations] MU Brno 1998, p. 83).

The practice of the legislature and the executive branch, and especially the case law of the courts, also do not give a completely unambiguous answer to this question. The Constitutional Court itself has ruled on this issue in the past that "deleting the authorizing statutory provision can not automatically annul a decree issued on the basis of that authorization, unless that is expressly stated in the statute, so the contested decree remains a valid component of the Czech legal order" (Pl. ÚS 3/2000, published as no. 231/2000 Coll. as amended by announcement of the Constitutional Court no. 130/2001).

In this regard we can also point to the newer case law of the Supreme Administrative Court, which took the cited Constitutional Court judgment as a starting point, and stated that it is not possible to reach a substantively supported conclusion that a regulation is invalid only on technical legislative grounds, that is, only because the original statutory authorization was derogated and "shifted" to a different statute. Therefore, the fundamental substantive imperative must always be the specific and clearly expressed will of the legislature. The decisive factor for the legal effects of a regulation is its substantive relationship to the expressed will of the legislature (cf. judgment of the Supreme Administrative Court file no. 5 A 75/2002).

The issue presented by the petitioners is also evaluated in this context in the theoretical and practical fields, to the effect that "if an implementing regulation was not annulled by a new statute, it continues in effect. Because the authorization to issue an implementing regulation ceases to exist after the statute is annulled, the ability to annul that regulation also ceases to exist." (see Zářecký, P.: K normotvorné činnosti ministerstev a jiných správních úřadů. [On the Norm Creating Activities of Ministries and Other Administrative Offices] Správní právo [Administrative Law] no. 3/96, p. 140).

D) The foregoing indicates that the question of the MLSA's authority to issue the contested decree must be viewed in terms of the constitutional principle of separation of powers. In any case, from constitutional law viewpoints, this principle is determinative and primary in comparison with the structure and hierarchy of the legal order, which is derived from the position and functions of individual branches and state bodies or local government bodies and from the powers with which the individual branches are endowed by the Constitution of the CR. The hierarchy of the legal order and the legal force of individual legal regulations is only a reflection of individual constitutional principles, such as the principle of democratic legitimacy of the state authority and the legitimizing function of the people, the principle of separation of powers, etc.

The annulment of the relevant authorizing provisions in § 148a and § 275 par. 1 let. b) of the Labor Code did not result in automatic derogation of decree no. 19/1991 Coll., which was thus, even after 31 May 1994, a valid component of the legal order, although hardly applicable without anything further, i.e. effective, component of the legal order. However, it is undisputed that the will of the legislature at the time expressed the desire for the subject matter regulated by the decree to be integrated in the text of the statute in future (cf. the background report to the draft of Act no. 74/1994, publication no. 548/93). In other words, in terms of the construction of the text of the statute, which in this case must also be interpreted by the intent of the legislature expressed in the background report, this case concerned an implicit order to the executive branch for the relevant sub-statutory implementing legal framework to be formally legally annulled.

If the legislature annuls the relevant authorizing provision of a statute, one can not say that this derogation, without anything further, evokes the formal derogation of implementing legal regulations, but it is necessary in that situation to always review the material prerequisites for the existence and functioning (effectiveness) of that derived legal regulation. That legal regulation – until it is formally annulled by another normative legal act – remains a valid legal regulation, but in applying it one must take into account the fact that the substantive prerequisite for the functioning of that regulation, that is, a specific statutory authorization, is lacking.

Peripherally, the Constitutional Court points out that if the judicial branch is in that situation faced with the question of whether to apply the relevant legal regulation, it must necessarily deal with the absence of substantive prerequisites for the functioning of that legal regulation, i.e., its effectiveness, and deny application to that regulation (Art. 95 par. 1 of the Constitution of the CR).

Therefore, decree no. 19/1991 Coll. was a valid legal regulation until it was formally annulled by decree no. 405/2003 Coll., but, of course, a regulation which, in view of the lack of material conditions for its further normative functioning (the absence of statutory authorization, subject matter regulated beyond the statutory scope, etc.) was not an effective and applicable regulation, i.e., one which was really capable of having legal effects.

As regards the question of the MLSA's authority to annul the decree, one must begin with the facts stated above, in particular with the functioning of the principle of separation of powers. These facts indicate that the MLSA, whose jurisdiction also includes the legal framework contained in the annulled decree (§ 9 of the Establishment Act), had the authority to annul the original decree no. 19/1991 Coll., without express statutory authorization being necessary.

The authority to issue legal regulations was not established by the annulled authorizing provision contained in the Labor Code, as the petitioners believed, but by Art. 79 par. 3 of the Constitution of the CR, which reflects the constitutional principle of separation of powers. In other words, during the entire period of existence of the implementing legal regulation, the relevant executive body has the authority to amend it – if that amendment observes the requirement contained in Art. 79 par. 3 of the Constitution of the CR – or even to annul it. Even after statutory authorization to issue an implementing legal regulation is annulled, the executive body has norm creating authority, but only authority to derogate from that legal regulation, and because this situation concerned an act of annulment – i.e., an act without substantive content – it did not need statutory – i.e., jurisdictional – definition, which applies, as stated above, only to the scope and content of such an act. In fact the legislature can not issue authorization to annul a sub-statutory regulation, because this is an independent sphere of authority of the executive branch, which is not, in such a case, tied to the legislature, because the executive branch is issuing, on the basis Art. 79 par. 3 of the Constitution of the CR, an act without substantive content, which the legislature could influence by a simple statute. And on the contrary, it would be a violation of the principle of separation of powers if the relevant legal framework contained in an implementing legal regulation were amended directly by the legislature.

In the adjudicated case this conclusion is also supported by the fact that the legislature itself, in connection with annulling statutory authorizations contained in the Labor Code, declared that the regulation contained in the decree should be part of a statute, not a sub-statutory implementing regulation (see the background report to the draft of Act no. 74/1994 Coll.), whereby the MLSA gave an implicit instruction for the relevant decree to be annulled.

Therefore, one can not accept the opinion of the petitioners that it is only the legislative branch which was authorized to annul the original decree, or to empower the executive branch to annul it. On the contrary, one must insist that if the legislature continued to consider it suitable and useful to extend the legal framework contained in decree no. 19/1991 Coll., it would now have to include it directly in the text of the statute.

Insofar as the petitioner, in the hearing, pointed to the principle of protection of acquired rights, the Constitutional Court adds that the issue of acquired rights to the instant claims will be addressed in individual disputes before the general courts, if it arises.

In view of the foregoing facts, the Constitutional Court concluded that there are no grounds here to annul the contested legal provision, and therefore it denied the petition under § 70 par. 2 of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations.

Notice: Decisions of the Constitutional Court cannot be appealed.

Brno, 20 October 2004