

1999/01/19 - PL. ÚS 17/98: GENERALLY BINDING MUNICIPAL ORDINANCE

HEADNOTE

The Constitutional Court considers local government an irreplaceable component of democracy: it is an expression of the ability of local bodies to regulate and manage areas of public affairs. In performing local government tasks, a municipality must choose adequate means. Otherwise it acts in conflict with the Constitution.

CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT
IN THE NAME OF THE CZECH REPUBLIC

The Constitutional Court of the Czech Republic decided in the matter of a petition by a group of deputies in the Chamber of Deputies of the Parliament of the Czech Republic to annul a generally binding ordinance of the town of Jeseník, no. 8/94 of 9 November 1994, banning fascist, communist, Nazi and racial propaganda in the town of Jeseník, under § 87 par. 1 letter b) of the Constitution of the Czech Republic and § 70 of Act no. 182/1993 Coll. on the Constitutional Court, as amended by later regulations, as follows:

Jeseník town ordinance, no. 8/94 of 9 November 1994, banning fascist, communist, Nazi and racial propaganda in the town of Jeseník, is annulled as of the day of promulgation of this judgment in the Collection of Laws.

REASONING

I.

On 22 May 1998 the Constitutional Court received a petition from a group of 27 deputies in the Chamber of Deputies of the Parliament of the Czech Republic to annul a generally binding ordinance of the town of Jeseník, no. 8/94, banning fascist, communist, Nazi and racial propaganda in the town of Jeseník.

The contested ordinance states that it was issued under § 16 and § 36 par. 1 letter 1 of Act no. 367/1990 Coll., on Municipalities (Municipal Establishment), as amended by later regulations (the “Act on Municipalities”). The ordinance text states in Art. 1 that fascist, communist, Nazi and racial propaganda is banned in the town of Jeseník. Article 2 states that such propaganda is understood to mean a) demands to change the constitutional order

by force, b) use of the symbols of these criminal movements in promoting them and c) casting doubt on the criminality of regimes which represented these movements. Article 3 states that the ordinance goes into effect on the 15th day after its promulgation.

In its petition the group of deputies points to the powers of municipal (or city) representative bodies to approve and issue generally binding ordinances in matters under the municipality's independent jurisdiction. However, in issuing them, the representative body is limited by its jurisdiction, which can be determined only by statute (Art. 104 par. 1 of the Constitution). Such a law is, first, the Act on Municipalities, under § 13 par. 2 of which a municipality, in exercising its independent jurisdiction, is governed only by laws and other generally binding legal regulations issued by central bodies to implement them. Under § 16 par. 2 such ordinances must be in accordance with the laws and other specified legal regulations. The petitioners state that the sphere of matters entrusted to the independent jurisdiction of municipalities is provided as an example in § 14 and generally in § 15 of the Act on Municipalities, and that one can conclude from the purpose of statutory authorization of municipal representative bodies to issue ordinances that this authorization must be interpreted restrictively, as it applies only to matters in which the municipality is not a subject authorized to determine a citizen's duties by unilateral orders and prohibitions.

The petitioners rely on a legal opinion stated in Constitutional Court judgment Pl. ÚS 26/93, under which violation of constitutional jurisdiction in issuing a sub-statutory legal regulation is grounds for its annulment. They also state that the Constitutional Court's published judgments on jurisdiction under Art. 87 par. 1 letter b) of the Constitution state that an ordinance which was, from the municipality's position, passed in the prescribed procedural manner and, per its name, within its independent jurisdiction, even though its content violated the relevant authorizing provisions of the Constitution and the Act on Municipalities, cannot be considered a legal regulation issued by a municipality within its independent jurisdiction. Therefore, under Art. 87 par. 1 letter b) of the Constitution and § 70 par. 1 of Act no. 182/1993, such a regulation must be annulled, because constitutional jurisdiction was violated when it was issued, i.e., it was not passed and issued within the bounds of constitutionally defined jurisdiction.

In view of the fact that - in the opinion of the petitioners - the contested generally binding ordinance violated Art. 2 par. 4 and Art. 104 of the Constitution, Art. 2 par. 2 and 3, Art. 4 par. 1 and 2, Art. 17 par. 1, 2 and 4, and Art. 34 par. 1 of the Charter, § 13, § 14 and § 16 of Act no. 367/1990 Coll. on Municipalities, Art. 19 of the International Covenant on Civil and Political Rights, Art. 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the group of deputies proposes annulling this ordinance.

II.

The complaint was reviewed in formal terms and no grounds for rejecting it were found.

III.

The Constitutional Court stated that in proceedings on the annulment of the generally binding ordinance, as well as another legal regulation, the Constitutional Court reviews its content according to the criteria provided in § 68 par. 2 of Act no. 182/1993 Coll. 6) on the Constitutional Court, which include passing the ordinance within the bounds of constitutionally defined jurisdiction and its accordance with legal regulations of a higher degree of legal force.

Under Art. 79 par. 3 of the Constitution of the Czech Republic, local government bodies may issue legal regulations on the basis of and within the bounds of a statute, if they are authorized to do so by the statute. Namely, municipal representative bodies may, within the limits of their jurisdiction, issue generally binding ordinances (Art. 104 par. 3 of the Constitution). The systematic ordering of the cited provisions indicates that the first enshrines the power to issue generally binding ordinances in transferred jurisdiction, and the second enshrines the power to issue these ordinances in the municipality's independent jurisdiction. Art. 79 par. 3 of the Constitution is the legal basis for derived local creation of legal norms, and 104 par. 3 enshrines the original power to create legal norms.

The generally binding ordinance contested by the petition from the group of deputies was not issued on the basis of statutory authorization in matters falling under transferred jurisdiction (§ 21 et seq. of the Act on Municipalities). On the contrary, as its introductory provision states, it relies on § 16 and § 36 par. 1 of the cited Act. That would indicate that this an ordinance issued under the municipality's independent jurisdiction. The Constitutional Court confirms the constructions expressed in a number of its earlier decisions (e.g. Pl. ÚS 44/95, Pl. ÚS 4/96 etc.) under which a municipality may, within its independent jurisdiction, handle by generally binding ordinances only those tasks of public administration that the law, in the first place the Act on Municipalities, identifies as its independent jurisdiction, with the additional condition that it do so in a manner which does not conflict with constitutional acts, international treaties under Art. 10 of the Constitution, or laws and legal regulations issued by central government bodies for their implementation (Art. 87 par. 1 letter b) of the Constitution, § 16 par. 2 of the Act on Municipalities). A municipality may not, under any circumstances, by a generally binding ordinance regulate something that is reserved for regulation by statute. The Constitutional Court concludes that the present generally binding ordinance of the town of Jeseník regulates those social relationships that are reserved for legal regulation only by statute, i.e. a form of legal regulation which can be passed only by the Parliament of the Czech Republic (Art. 15 par. 1 of the Constitution). Under Art. 104 of the Constitution the jurisdiction of a representative body can be provided only by statute, which means that a representative body may not itself expand this jurisdiction using generally binding ordinances. For these reasons a generally binding ordinance cannot ban a certain kind of propaganda. In terms of content, the closest statutory provisions in this connection are § 260 and § 261 of the Criminal Code, on the support and propagation of movements aimed at suppressing citizens' rights and freedoms. As that provision of the Criminal Code observes the requirement of Art. 39 of the Charter, under which only a statute may designate what conduct is a crime and what punishment, as well as what other detriment, in rights or property, can be imposed for committing it, by that alone the contested

ordinance comes into conflict with Art. 39 of the Charter, because, as a sub-statutory legal regulation, it cannot regulate something that is exclusively subject to statutory regulation.

The Constitutional Court adds that in accordance with its previous opinions (e.g. Pl. ÚS 1/96) it considers local government an irreplaceable component of the development of democracy. Local government is an expression of the rights and abilities of local bodies, within the bounds set by law, within their responsibility and in the interest of local residents, to regulate and manage areas of public affairs. A municipal representative body is indisputably a body which cannot be indifferent to whether political parties, their branches or their members in the municipality behave in a manner which conflicts with the law or even meets some of the material elements of crimes provided in the Criminal Code. Municipal bodies, whether elected or appointed, can substantially contribute to the level of information of responsible authorities and the public - under the Criminal Code or the Act on Association in Political Parties and Political Movements - about whether political parties or their followers act in conflict with what their articles of association proclaim. However, if a municipality wishes to manifest its political will in performing its local government acts in the interest of local residents, it must do so using adequate means. In the adjudicated matter, the town of Jeseník, by choosing the means of a generally binding ordinance, i.e., a normative act, acted in an inadequate manner.

For the foregoing reasons, the Constitutional Court reached the conclusion that the contested ordinance is in conflict with Art. 104 par. 3 of the Constitution of the CR, and § 13 par. 2, § 14 par. 1, § 16 par. 2 of the Act on Municipalities, as amended by later regulations, and therefore, without considering it necessary to review the other reasons stated in the petition, decided that Jeseník town ordinance no. 8/94, banning fascist, communist, Nazi and racial propaganda in the town of Jeseník is annulled as of the day of promulgation of this judgment in the Collection of Laws.

Overview of the most important legal regulations

1. Art. 15 par. 1 of Act no. 1/1993 Coll., the Constitution of the CR, provides that the legislative power of the Czech Republic is vested in the Parliament.
2. Art. 104 par. 1 of Act no. 1/1993 Coll., the Constitution of the CR, provides that the powers of representative bodies shall be provided for only by statute. Under par. 2 representative bodies of municipalities shall have jurisdiction in matters of self-government, to the extent such matters are not entrusted by statute to the representative bodies of higher self-governing regions.
3. Art. 79 par. 3 of Act no. 1/1993 Coll., the Constitution of the CR, provides that 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.
4. Art. 87 par. 1 letter b of Act no. 1/1993 Coll. of the Constitution of the CR, provides that the Constitutional Court has jurisdiction to annul other legal enactments or individual provisions thereof if they are inconsistent with a constitutional act, a statute, or an international treaty under Art. 10.
5. Art. 39 of Act no. 2/1993 Coll., on the declaration of the Charter of Fundamental Rights and Freedoms, provides that only a law may designate the acts which constitute a crime and the penalties or other detriments to rights or property that may be imposed for committing them.
6. § 68 par.2 of Act no. 182/1993 Coll., on the Constitutional Court, provides that in its decision making the Constitutional Court shall assess the contents of a statute or some other enactment from the perspective of its conformity with a constitutional act or an Article 10 Treaty, or with a statute if some other type of enactment is concerned, and ascertain whether it was adopted and issued within the confines of the powers set down in the Constitution and in the constitutionally prescribed manner.
7. § 13 par. 1 of Act no. 367/1990 Coll., on Municipalities (Municipal Establishment), provides that a municipality manages its affairs independently and par. 2 provides that in exercising its independent jurisdiction a municipality is guided only by statutes and generally binding regulations issued by central bodies for their implementation.
8. § 16 par. 1 of Act no. 367/1990 Coll., on Municipalities (Municipal Establishment), provides that to perform its tasks, a municipality may issue generally binding ordinances for its territory. Par. 2 provides that generally binding ordinances must be in accordance with the laws and generally binding legal regulations issued by central state government bodies for their implementation.