2003/02/05 - PL. ÚS 34/02: TERRITORIAL SELF-GOVERNMENT

HEADNOTES

The guarantee of territorial self-government in the Constitution is laconic. Alongside the differentiation of the local and regional levels of self-government (Art. 99) territorial self-government is conceived as the right of a territorial association of citizens, arising from its characteristics and abilities, as the Constitutional Court stated in its finding of 19 November 1996, file no. Pl. ÚS 1/96 (Collection of Decisions of the Constitutional Court, volume 6, p. 375).

"The Constitutional Court considers local self-government to be an irreplaceable component in the development of democracy. Local self-government is an expression of the capability of local bodies, within the bounds provided by law, to regulate and govern part of public affairs on their own responsibility and in the interest of the local population."

The Constitution makes it possible to support this capability by, among other things, establishing the legal subject status of territorial self-governing units, and presumes that self-governing units have their own property and manage themselves out of their own budget (Art. 101 para. 3). The democratic character of self-government is also confirmed at the constitutional level in the guarantee of elected representative bodies (Art. 101 para. 1 and 2 and Art. 102). Of course, the Constitution also presumes uniform state regulation of self-government in a statutory framework. The definition of that para.t of public affairs which a local or regional association of citizens is capable of managing is entrusted to the legislature, i.e. the state power (Art. 104), not to the constitutional framers, who would define matters of local significance at the highest level. The constitutions of a number of other European states also rely on the authorization of the legislature to define matters of territorially limited importance which are entrusted to territorial self-governing units.

The right to self-government generally expressed by the Constitution certainly may not be depleted by the legislature, but it is certain that the legislature has wide space to determine which affairs are best managed at the local or regional level without greater interference by the central state power. It is difficult to determine in advance, non-politically, expressly from legal, economic, political and other points of view, which matters have local or regional effect and therefore deserve to be taken out of the purview of the central power. Decision making about the jurisdiction of territorial self-government is always political.. Even matters of clearly local or regional character can acquire state-wide significance, for example, fundamental human rights and freedoms may be affected or consequences can be carried across the borders of the territorial self-governing association of residents, which is increasingly frequent in an environment with a highly mobile population.

It can not be overlooked that the Constitution expressly presumes (Art. 105) that territorial self-governing units will share in the exercise of state power on the basis of

statutory authorization. Such sharing of the exercise of state power of course brings with it the subordination of self-governing units to state inspection, the purpose of which is to ensure quality exercise of state power. This subordination must also, understandably, be based on statute. The constitutional does not say unambiguously whether the exercise of state administration can be imposed upon territorial self-governing units compulsorily, or whether it is possible to execute such statutory transfer only on the basis of an agreement between the state and the territorial self-governing unit. In light of the emphasis on self-government, the requirement of a consensus would certainly appear stronger. On the other hand, however, it is evident that uniform exercise of state power under transferred jurisdiction by municipalities, cities, and regions is generally accepted in this country and has never been disputed as incompatible with the right of territorial associations of citizens to self-government. Even the group of senators does not dispute it, as such, in its petition to annul some provisions of Act no. 320/2002 Coll.

The Czech constitutional standard of local self-government is supplemented and enriched by a standard which arises from the international obligations of the Czech Republic, namely from the Charter of Local Self-Government, agreed on 15 October 1985, which entered into force for the Czech Republic on 1 September 1999, published in the Council of Europe under no. 122 ETS and in the Czech Republic under no. 181/1999 Coll. and no. 369/1999 Coll.

The Local Charter is not a classic agreement on human rights; it does not concern individuals, but associations of citizens, and it establishes collective rights. The idiosyncrasies of interpreting and applying it follow from this. The rules it expresses, which create the European standard of local self-government, can only with difficulty be self-executing. The European standard of territorial self-government is expressed by qualities which a party's self-governments are to exhibit, or rights which they are to enjoy. The parties have an obligation to guarantee their territorial self-governments a certain number of such rights determined by the Local Charter. Rights guaranteed by the Local Charter to the territorial self-governments of the parties are a framework. The Local Charter itself, in a number of provisions, presumes detailed domestic law regulation which surely represents bounds within which territorial self-government will apply. It definitely does not guarantee the full freedom of territorial self-government. That is not the European tradition. Statutes, or other regulations, depending on the choice and tradition of the parties, may define in detail the range of matters managed by territorial self-government, including those which a self-governing unit has an obligation to pursue, its organization, including the form and status of individual bodies, may determine the framework for management, and may allocate property and financial resources. The Local Charter certainly does not make territorial self-governing units into sovereign bodies similar to states.

CZECH REPUBLIC

CONSTITUTIONAL COURT

JUDGMENT

IN THE NAME OF THE CZECH REPUBLIC

The Plenum of the Constitutional Court decided 5 February 2003 on a petition from a group of Senators of the Parliament of the Czech Republic to annul points 2, 5, 6, 7, 8, 9 and 11 Art. CXVII of Act no. 320/2002 Coll., Amending and Repealing Certain Acts in Connection with Ending the Activities of District Offices, as follows:

The petition is denied.

REASONING

I.

The group of senators filed with the Constitutional Court, under Art. 87 para. 1 let. a) of the Constitution of the Czech Republic (the "Constitution") and § 64 para. 1 let. b) of Act no. 182/1993 Coll., on the Constitutional Court, a petition to annul some provisions of Act no. 320/2002 Coll., Amending and Repealing Certain Acts in Connection with Ending the Activities of District Offices.

The group of senators seeks annulment of the legal framework which provides for transferring the employment relationships of employees, officials of district offices, which are to be terminated as of 1 January 2003 under Art. CXVII of point 1 of Act no. 320/2002 Coll., the Act whose selected provisions are proposed to be annulled, to territorial self-governing units (municipalities and cities authorized to exercise transferred jurisdiction and regions) without the affected employees' own decision and likewise without the consent of the appropriate self-governing units. The legal framework which orders this change is contained in points 2, 5 and 8 Art. CXVII of Act no. 320/2002 Coll., in this wording:

2. The rights and obligations from employment relationships of employees of the Czech Republic assigned to work in district offices (a "district office employee") are transferred from the Czech Republic to territorial self-governing units in cases where the activities of a district office employee provided by this Act or a special law are transferred to the jurisdiction of territorial self-governing units.

5. In the event that an agreement under point 3 is not reached by 1 September 2002, the Ministry of the Interior shall set the numbers and rules for re-assignment of employees to the appropriate territorial self-governing units or administrative offices at the proposal of the chairman of the district office and with the recommendation of the director of the regional office.

8. The provisions of § 102 para. 2 let. j) of Act no. 128/2000 Coll., on Districts (District Establishment), and § 59 para. 1 let. b) of Act no. 129/2000 Coll., on Regions (Regional Establishment), on Setting the Numbers of Employees of Territorial Self-Governing Units shall not apply to cases under point 2.

The group of senators claims that with this framework the legislature violated and limited the fundamental rights and principles of the organization of state power enshrined in Art. 8, Art. 79 para. 3 and Art. 100 para. 1 and Art. 101 para. 4 of the Constitution, Art. 2 para. 2, Art. 4 para. 1, 2 and 4 and Art. 9 of the Charter of Fundamental Rights and Freedoms (the "Charter"), Art. 6 para. 1 of the Charter of Local Self-Government (the "Local Charter") a Art. 4 para. 2 the Convention on Protection of Human Rights and Fundamental Freedoms (the "Convention").

The group of senators points to Art. 8 and Art. 100 of the Constitution, which declare self-governing units to be territorial associations of citizens with the right to self-government in the form of sharing in the exercise of state power through their representatives. It points to a Constitutional Court decision (Pl. ÚS 1/96) and Art. 3 para. 1 of the Local Charter, under which local self-government is an expression of the capability of local bodies, within the bounds provided by law, to regulate and govern part of public affairs on their own responsibility and in the interest of the local population. This includes the ability to set the numbers of self-government employees. State interference in this autonomy degrades self-government into the form it took before 1989, the model of national committees controlled from above. Territorial self-governing units are independent subjects which act in their own name, which bear their own responsibility, including as employers. Autonomous decision making on employees is set by § 102 of Act no. 128/2000 Coll., on Districts (District Establishment), and § 59 of Act no. 129/2000 Coll., on Regions (Regional Establishment). Under Art. 6 para. 1 of the Local Charter, it is local associations which set their own internal structure according to their needs. Authoritative re-assignment of employees interferes with self-governing units' management of their own property, because it forces them to use para.t of their assets to pay the employees. However, it does not take the local financial situation into account.

The group of senators recognizes that territorial self-government is not unlimited; it may be interfered with to protect the law and in a manner provided by law. The contested provisions of the Act, according to the group of senators, are not capable of causing the transfer of employment relationships under § 249 of the Labor Code. The contested point 2 is a general declaration, and no succession can be implemented on the basis of it, which, in any cases, also follows from the fact that it is not effective until 1 January 2003. Therefore, transfer is only possible on the basis of agreement (point 3) or re-assignment (point 5). There is no objection to agreement. In contrast, authoritative re-assignment (point 5) is a violation of constitutional principles for legislative regulation, as it is not the Act but the Ministry of the Interior that decides on the re-assignment of employees to individual self-governing units. Thus, this violates the legislature's obligation under Art. 4

para. 1 of the Charter to impose obligations only on the basis of statute and within its bounds. Nor does this meet the requirement in Art. 79 para. 3 of the Constitution, under which administrative offices may issue legal regulations only on the basis of a statue and within its bounds, if they are authorized thereto by the statute. The legislature did not set the bounds of this legislative activity by the Ministry of the Interior. Point 5 governs "rules and numbers." According to the group of senators this means that the Ministry's decision is of a normative nature. The Constitutional Court has already repeatedly stated that the legislature and the executive branch may not apply the forms of law arbitrarily, but must be governed by the directive of the framers of the constitution and the requirements of transparency, accessibility and clarity (finding no. 167/2000 Coll.). This requirement has not been met in this case, as it is not clear whether a decision is published and to whom it is delivered. The Act does not indicate which territorial self-governing unit employees are to be transferred to. In practice, the decision is made by the chairman of the district office. Means of redress against such decisions are lacking. Thus, state power is applied inconsistently with Art. 2 para. 2 of the Charter, because statutory limits for regulation are missing. This also violates Art. 101 of the Constitution. Interference into the activities of territorial self-governing units is supposed to be determined by statute, in order to protect it. Termination of district offices is not a necessary reason for employing former state employees.

The group of senators also points to the need to evaluate the disputed provisions of Act no. 320/2002 Coll. from the point of view of the employees. Re-assignment binds the employees to another entity, probably to work in another place, and maybe to perform work of a different kind, without their will to do so. The conclusion that this labor is of a forced nature is not changed by the possibility of giving notice, because the employee will have to work during the notice period. In addition, he would not be entitled to severance pay. Therefore, the disputed regulation is inconsistent with Art. 4 para. 2 of the Convention and Art. 9 para. 1 of the Charter, which prohibit forced labor, and none of the exceptions have been met. Moreover, the forced labor is not provided by statute but by a re-assignment decision.

Because of their connection to the transfer of district office employees' employment relationships to territorial self-governing units, the group of senators also proposes annulling related provisions, points 6, 7, 9 and 11 Art. CXVII of Act no. 320/2002 Coll., which read as follows:

6. In cases where a district office employee's activities provided by this Act are not transferred to territorial self-governing units under point 2, the exercise of rights and obligations from a district office employee's employment relationships is transferred from the district office to the Office for State Representation in Property Matters, unless a special regulation provides otherwise. These employees shall secure the performance of tasks related to terminating the activities of district offices after 1 January 2003.

7. District office employees' entitlements based on employment relationships which were not transferred to the appropriate territorial self-governing units under point 2, as well as entitlements of the Czech Republic from employment relationships vis-à-vis district office employees shall be satisfied and exercised in the name of the state by the Ministry of Finance.

9. The provisions of § 251d of the Labor Code shall not apply to procedures under points 2 and 3.

11. Personal property owned by the Czech Republic which district offices had jurisdiction to manage and which is necessary for the performance of activities transferring to the jurisdiction of territorial self-governing units under this Act and which is used by district office employees to whom point 2 applies shall be transferred, with the exception of things specified in point 12, as of 1 January 2003 from the Czech Republic to that territorial self-governing unit to which the rights and obligations from employment relationships of the district office employees are being transferred.

II.

The Chamber of Deputies of the Parliament of the Czech Republic, in its position statement, points to the background report to the draft Act, which points out that the draft act also addresses the employment relationships of district office employees. The aim of the re-assignment provision is to ensure the proper performance of state administration by the territorial self-governing units to which individual areas of jurisdiction will be transferred by trained employees, those who are already performing these activities. In cases where an employee does not agree to be transferred to a territorial self-governing unit or to the Ministry of the Interior, labor law procedures will be followed. The petitioners' opinion appears self-serving and one-sided, as it does not observe the requirements for the exercise of state power, specifically the need for a professional apparatus. Personnel provisions are connected to the reform of public administration. In view of the fact that a fundamental condition for re-assignment is agreement by the parties, this does not, under any circumstances, create forced labor or services. Granting the petition threatens to endanger the employment and social certainties of district office employees who agreed with the transfer of themselves and their functions to regional offices or district offices of municipalities with expanded jurisdiction. According to the statement, the Act was properly approved, signed by the appropriate constitutional representatives, and promulgated. The Chamber of Deputies is convinced that the Act is consistent with the constitutional order and the legal order.

The Senate of the Parliament of the Czech Republic, in its position statement, points out the circumstances surrounding the passage of the Act. An amending proposal was filed, pointing to the impermissibility of authoritative re-assignment as non-permitted interference into the self-government of municipalities and regions. However, the Senate did not agree with this proposal. The Act was returned to the Chamber of Deputies with those amending proposals which the Senate accepted. Concerning the petition from the group of senators, the Senate points out that under Art. 105 of the Constitution the exercise of state administration can be entrusted to self-governing bodies only by statute. That is what Act no. 320/2002 Coll. is. It transfers the exercise of state administration to territorial self-governing units in an unprecedented extent, and some activities are entrusted to the independent jurisdiction of territorial self-governing units. It aims to significantly strengthen the position of territorial self-governing units, not to attempt to limit their constitutional right to self-government. The contested provisions ensure the proper implementation of the transfer of jurisdiction to municipalities and regions. The

exercise of state administration is decision making about the rights and obligations of citizens and legal entities. Therefore, it is in the general interest to have adequate personnel in the authorized territorial self-governing units. The general framework of the contested point 2 is made more specific by further provisions, which give priority to the jurisdiction of territorial self-governing units in setting the number of employees. Authoritative re-assignment is an extreme possibility. In this context the provision on the non-necessity of a decision by the council of the appropriate territorial self-governing unit on the number of employees will also hold up. Self-government of municipalities and regions is not an untouchable value. Territorial self-governing units are public law corporations whose priority when fulfilling their tasks is not the protection of their own interests, but above all the obligation to care for the needs of citizens and to protect the public interest. The quality of decision making is certainly such a public interest. The Senate concluded that providing personnel for the reform of the public administration through the transfer of employees from terminated district offices to municipalities and regions will most effectively ensure good quality decision making practices. Therefore it agreed with the legal framework at issue. The Minister of the Interior's assurance that, as part of organizational measures connected to the reform of the public administration, corresponding wage funds would be transferred to territorial self-governing units together with state employees also contributed to this decision. The Senate further believes that the legal framework creates an adequate statutory framework for implementing the transfer of employees. In response to the alleged forced nature of labor in the transfer on the basis of re-assignment, the Senate states that the general framework for the transfer of rights and obligations provided in a number of other statutes would then also have to be found unconstitutional. The transfer of rights and obligations from employment relationships means that there is a change of employer, where a new employer enters into all the rights and obligations of the previous employer. Nothing else in the employment relationship changes. The succeeding employer is also bound by the kind of work agreed in the employment agreement and by the place of performing the work. If an employer could not allocate the agreed work, it is up to the employer to negotiate a change. Only if an employee did not agree to the change can, for example, dissolving the employment relationship be considered. Until that time an obstacle to work on the part of the employer would exist. The reason for dissolving the employment relationship is then such that the employee would be entitled to severance pay.

The group of senators, in response to the position statements of the Chamber of Deputies and the Senate, emphasizes that the reform introduced by the Act does not strengthen self-government, as it concerns the transfer of functions under transferred jurisdiction. It also rejects the Senate's claim that agreement is always a condition for re-assignment. It points out that the houses of Parliament have not adequately addressed the question of a statutory basis for setting the numbers and rules for re-assignment of employees to territorial self-governing units or administrative offices, and it points out the existing conflicts between municipalities and the terminated district offices. The group of senators considers the parallel with labor law to be inadequate in many respects. Concerning the Minister of the Interior's assurance that the transfer of employees to territorial self-governing units will be financially secured, which contributed to the Act being passed, the group of senators stresses that no such entitlements arise from the Act, and that financing of this transfer is governed only by a government resolution, and only for 2003.

III.

The petition to annul individual provisions of the Act was filed by a group of 20 senators, as an authorized petitioner. Because no reason to reject the petition and no reason to stop the proceedings came to light in the course of the proceedings, the Constitutional Court discussed the petition and decided on it (§ 68 para. 1 of the Act on the Constitutional Court).

IV.

The Constitutional Court then considered the matter under § 68 para. 2 of the Constitutional Court Act. The Constitutional Court verified that the Act whose provisions are proposed to be annulled was duly discussed and approved by both houses of Parliament, was signed by the appropriate constitutional representatives, and promulgated in the Collection of Laws, and it stated that the Act was passed and issued within the bounds of constitutionally provided jurisdiction and in a constitutionally prescribed manner.

The Constitutional Court then evaluated the content of the contested provisions of the Act in terms of their consistency with constitutional laws and international agreements under Art. 10 of the Constitution.

The objections of the group of senators against the authorization of the Ministry of the Interior for authoritative re-assignment of employees from terminated district offices to the offices or regions, cities and municipalities, can be divided into three most fundamental and important ones: 1. a reference to violation of the right to self-government, 2. a reservation about the forced nature of the labor of a compulsorily re-assigned employee and 3. notice of the unclear and legally insufficiently supported manner of deciding on re-assignment.

V.

The guarantee of territorial self-government in the Constitution is laconic. Alongside the differentiation of the local and regional levels of self-government (Art. 99) territorial self-government is conceived as the right of a territorial association of citizens, arising from its characteristics and abilities, as the Constitutional Court stated in its finding of 19 November 1996, file no. Pl. ÚS 1/96 (Collection of Decisions of the Constitutional Court, volume 6, p. 375).

“The Constitutional Court considers local self-government to be an irreplaceable component in the development of democracy. Local self-government is an expression of the capability of local bodies, within the bounds provided by law, to regulate and govern

part of public affairs on their own responsibility and in the interest of the local population."

The Constitution makes it possible to support this capability by, among other things, establishing the legal subject status of territorial self-governing units, and presumes that self-governing units have their own property and manage themselves out of their own budget (Art. 101 para. 3). The democratic character of self-government is also confirmed at the constitutional level in the guarantee of elected representative bodies (Art. 101 para. 1 and 2 and Art. 102). Of course, the Constitution also presumes uniform state regulation of self-government in a statutory framework. The definition of that part of public affairs which a local or regional association of citizens is capable of managing is entrusted to the legislature, i.e. the state power (Art. 104), not to the constitutional framers, who would define matters of local significance at the highest level. The constitutions of a number of other European states also rely on the authorization of the legislature to define matters of territorially limited importance which are entrusted to territorial self-governing units.

The right to self-government generally expressed by the Constitution certainly may not be depleted by the legislature, but it is certain that the legislature has wide space to determine which affairs are best managed at the local or regional level without greater interference by the central state power. It is difficult to determine in advance, non-politically, expressly from legal, economic, political and other points of view, which matters have local or regional effect and therefore deserve to be taken out of the purview of the central power. Decision making about the jurisdiction of territorial self-government is always political.. Even matters of clearly local or regional character can acquire state-wide significance, for example, fundamental human rights and freedoms may be affected or consequences can be carried across the borders of the territorial self-governing association of residents, which is increasingly frequent in an environment with a highly mobile population.

It can not be overlooked that the Constitution expressly presumes (Art. 105) that territorial self-governing units will share in the exercise of state power on the basis of statutory authorization. Such sharing of the exercise of state power of course brings with it the subordination of self-governing units to state inspection, the purpose of which is to ensure quality exercise of state power. This subordination must also, understandably, be based on statute. The constitutional does not say unambiguously whether the exercise of state administration can be imposed upon territorial self-governing units compulsorily, or whether it is possible to execute such statutory transfer only on the basis of an agreement between the state and the territorial self-governing unit. In light of the emphasis on self-government, the requirement of a consensus would certainly appear stronger. On the other hand, however, it is evident that uniform exercise of state power under transferred jurisdiction by municipalities, cities, and regions is generally accepted in this country and has never been disputed as incompatible with the right of territorial associations of citizens to self-government. Even the group of senators does not dispute it, as such, in its petition to annul some provisions of Act no. 320/2002 Coll.

The Czech constitutional standard of local self-government is supplemented and enriched by a standard which arises from the international obligations of the Czech Republic, namely from the Charter of Local Self-Government, agreed on 15 October 1985, which entered into force for the Czech Republic on 1 September 1999, published in the Council of Europe under no. 122 ETS and in the Czech Republic under no. 181/1999 Coll. and no. 369/1999 Coll.

The Local Charter is not a classic agreement on human rights; it does not concern individuals, but associations of citizens, and it establishes collective rights. The idiosyncrasies of interpreting and applying it follow from this. The rules it expresses, which create the European standard of local self-government, can only with difficulty be self-executing. The European standard of territorial self-government is expressed by qualities which a party's self-governments are to exhibit, or rights which they are to enjoy. The parties have an obligation to guarantee their territorial self-governments a certain number of such rights determined by the Local Charter. Rights guaranteed by the Local Charter to the territorial self-governments of the parties are a framework. The Local Charter itself, in a number of provisions, presumes detailed domestic law regulation which surely represents bounds within which territorial self-government will apply. It definitely does not guarantee the full freedom of territorial self-government. That is not the European tradition. Statutes, or other regulations, depending on the choice and tradition of the parties, may define in detail the range of matters managed by territorial self-government, including those which a self-governing unit has an obligation to pursue, its organization, including the form and status of individual bodies, may determine the framework for management, and may allocate property and financial resources. The Local Charter certainly does not make territorial self-governing units into sovereign bodies similar to states.

The Local Charter is not equipped with strict instruments for implementing itself; it lacks a mechanism for handling complaints on the part of self-government concerning its violation on the part of states-parties, let alone an effective targeted instrument for implement standards against states which are really violating the Local Charter. Only political instruments are available; the parties have an obligation to inform the Council of Europe on changes in the legislative framework (Art. 14), the Council of Europe prepares regular reports on the condition of territorial self-government and bodies functioning within in which represent territorial self-government and institutions monitoring the condition and development of territorial self-government in individual members states, first the Congress of Local and Regional Authorities of Europe. Nonetheless, a uniform authoritative interpretation of the provisions of the Local Charter which would separate cases of permissible state regulation from incompatible regulation, is lacking. The recommendations of the bodies and institutions of the Council of Europe to states, vis-à-vis their legislation and practice concerning territorial self-government have only limited significance. Generally they do not rely on provisions of the Local Charter.

Of course, the weakness of instruments for implementing the Local Charter changes nothing about its binding nature. The Local Charter is not a mere declaration; it is a true international agreement, which binds the parties to it. On the basis of a conception of the constitutional order that is broad and responsive to international law (Art. 112 para. 1 in connection with Art. 1 para. 2 of the Constitution, as amended), the Constitutional Court is authorized to evaluate the consistency of the Czech Act with international law [Art. 87

para. 1 let. a) of the Constitution, as amended]. The framework nature of the Local Charter and the specific nature of the collective rights it expresses do not prevent it from being used as a measure for the abstract review of the constitutionality of statutes. However, one can not forget its general character, which opens a wide space for political deliberation of the legislature of a state party when creating the relevant legislative framework. The Constitutional Court is decidedly not called upon to re-evaluate this political step; it merely verifies whether the bounds created by the Local Charter were not exceeded.

One can conclude from provisions of the Constitution and of the Local Charter that statutory limitations and instructions for the application of territorial self-government are permissible. In the aggregate, of course, these rules can not remove territorial self-government completely. However, an individual regulation can be relatively strict and restrictive, if there are important, justifiable reasons for this.

The Local Charter does not contain express provisions on transferring the exercise of state power to territorial self-governing units. Certainly for that reason international law does not prohibit the Czech Republic from it, but excessive burdening of self-governing units with the exercise of state administration may endanger their property and financial independence. Moreover, the extensive exercise of transferred jurisdiction by territorial self-government bodies can lead their officials into a “schizophrenic” position, where they must simultaneously take into account both the interests of the territorial association of persons and the interests of the state. However, the Local Charter can not be read to prohibit the forced exercise of state administration by self-government. In connection with the Czech reform of territorial administration, the Congress, in its recommendation for the Czech Republic, no. 77 of 2000, supported strengthening independent jurisdiction, among other things because this would reduce self-governing units’ dependence on the state when exercising transferred jurisdiction. Thus, the Council of Europe is aware of the problems which the transfer of state power to self-governing units causes for their functioning. However, this transfer was also one of the main elements of decentralization in the Czech Republic implemented by reform of public administration in 2000 (by Acts no. 128/2000 Coll., no. 129/2000 Coll. and no. 131/2000 Coll., on the Capital City of Prague, and other legal regulations). Thus, only with difficulty can it be considered incompatible with the Local Charter’s main direction.

The transfer of officials from terminated district offices is related to the transfer of the exercise of state power to regions and selected cities and municipalities. Basically the entire agenda entrusted to them is defined by Act no. 320/2002 Coll. as transferred jurisdiction. At the present time, when the regional level of self-government is still being created, one can justifiably have doubts about the ability of regions to immediately ensure the exercise of state power with their own forces. To a certain extent the same applies to newly authorized cities and municipalities which, although they have existed for more than ten years, will understandable never have as extensive and specialized an expert apparatus as the regions. Therefore, authoritative re-assignment can be understood as a transitional measure. A certain space is opened to regions and authorized cities and municipalities for a gradual change of personnel, according to their aims, through reorganization, applying qualification requirements, and so on. This process will be subject to only limited

inspection by central state bodies, whose only purpose is to prevent the regions, cities, or municipalities from endangering or failing in the exercise of state administration in transferred jurisdiction. Although permitting authoritative re-assignment by Act no. 320/2002 Coll. is a limitation on the autonomy of municipalities, cities and regions to determine the numbers of employees of their municipal, city or regional office [§ 102 para. 2 let. j) of the Act on Districts or § 59 para. 1 let. b) of the Act on Regions], but it is a lawful limitation. The provision on authoritative re-assignment under Act no. 320/2002 Coll. functions in this regard as a lex specialis vis-à-vis the cited provisions of statutes on territorial self-government.

Authoritative re-assignment is a turning away from the principle of the autonomy of local associations (territorial self-governing units) to create their own administrative structures (Art. 6 para. 1 of the Local Charter). In view of the idiosyncrasies indicated, this can hardly be considered a violation of the Local Charter. A new model of territorial self-government connected with the broad exercise of uniform state administration is still being created in the Czech Republic. The wording of the Local Charter is reserved; this international agreement speaks of autonomy defined by more general statutory bounds.

Authoritative re-assignment of officials from terminated district offices to regions and authorized cities and municipalities does represent a certain interference with the property situation of the territorial self-governing unit; municipalities, cities, and regions have legal subject status separate from the state, are furnished with their own property, and manage themselves under their own budget (Art. 101 para. 3 of the Constitution). However, detailed statutory regulation of the management of territorial self-government is permissible; self-government does not mean that local associations have sovereignty (Art. 101 para. 4 of the Constitution).

Czech territorial self-government is not fully independent in economic management in other respects as well. Taxes are collected uniformly in the territory of the entire state under state-wide legislation; only with some taxes and fees does the state, by its legislation, permit the municipalities, cities, and regions to range within certain bounds in setting rates. The state also determines the manner of distributing tax revenues, today with a high degree of redistribution [Act no. 243/2000 Coll., on the Budgetary Allocation of Revenues from Certain Taxes to Territorial Self-governing Units and Certain State Funds (the Budgetary Allocation of Taxes Act)]. Large differences in the property of regions, municipalities, and cities also resulted from the transfer of para. of state property (Act no. 172/1991 Coll., on the Transfer of Some Things from the Czech Republic to Municipalities). The management of cities, municipalities, and regions is markedly influenced by the subsidizing activities of central state bodies. The effect of investments made in municipalities directly by the state on local or regional situations is not negligible. The compensation framework for office holders and employees of territorial self-governing units is also state-wide. The management of municipalities, cities, and regions is also markedly influenced by the urgency and demands of needs which they satisfy within their independent jurisdiction.

Territorial self-government truly separate from the state in terms of property, comparable perhaps with early self-government in the USA, does not exist in the Czech Republic, and implementing it is unimaginable for many reasons. Comparable statutory definitions and limitations of the functioning and securing of territorial self-governing units exist in all

European states. The Local Charter respects this fact and only provides principles for sources of territorial self-government; they are supposed to correspond to the tasks of territorial self-government (Art. 9 para. 2) and they are to be applied as loosely as possible where true self-governing activity is concerned (Art. 9 para. 1). The Local Charter does not mention the financing of the exercise of state administration by territorial self-government.

The framework for financing territorial self-governing units, just like the definition of their tasks, undoubtedly may not be economical but lead to their financial collapse (Art. 100 para. 1 and Art. 101 of the Constitution, Art. 9 para. 4 and 7 of the Local Charter). Therefore, the view of authoritative re-assignment and the functioning of re-assigned employees of terminated district offices within regions, authorized cities and municipalities, in light of the Local Charter and of the Constitution must depend on the manner of state financing of the exercise of transferred jurisdiction. The present legal framework is not quite clear. Individual statutes on territorial self-government count on contributions for the exercise of state administration under transferred jurisdiction (§ 62 of the Act on Districts, § 29 para. 2 of the Act on Regions, as amended by later regulations). This contribution is decided by the state executive branch (the government of the Czech Republic, the Ministry of the Interior, the Ministry of Finance). The cited statutes do not formulate a more detailed directive for determining the amount of the contribution, and there is also no outline of the procedures for negotiating this amount or dispute resolution mechanisms. However, the terse statutory provisions on contributions can still be interpreted in a manner which is constitutional and conforms to international law so that they represent a guarantee for economically incurred expenditures in the exercise of state administration under transferred jurisdiction.

Therefore, the Constitutional Court intends to refrain from premature interference. However, it would take action if it found that the amount of a contribution or circumstances for providing it clearly did not correspond to the tasks assigned to a territorial self-governing unit. Insufficient financing of the exercise of state power in transferred jurisdiction endangers the very existence of functional territorial self-government. Principles expressed by the Constitution and by the Local Charter would thus be violated. However, more detailed legislative regulation of the financing of the exercise of state administration by territorial self-governing units appears desirable.

VI.

Evaluating authoritative re-assignment of district office employees to offices of territorial self-governing units by decision of the Ministry of the Interior at the proposal of the chairman of the district office, in terms of the objection of impermissibility of forced labor, can not be done without a reminder of other comparable cases which our law permits.

Automatic succession to the place of an employer takes place, for example, upon the death of the previous employer, a natural person, where the heirs become the new

employer (taking into account probate rules and the interests of the employee as a creditor), upon the merger of legal entities of the same or different types, upon the splitting of legal entities, upon the sale of a business or in connection with the bankruptcy of an employer. A change in the management or membership of an employer which is a business company or other legal entity can often be more significant than a formal change of employer.

Undoubtedly the main reason for automatically preserving the employment relationship in these cases is to protect the employee from the threat of unemployment. Some changes occur unexpectedly and also immediately (the death of an employer); others can be foreseen, but they take place relatively quickly (the sale of a business that is in trouble). Permitting the successor to the rights and obligations of the employer to end the employment relationship would open room for abuse of this opportunity; an employer could implement many measures only in order to get rid of his employment law commitments.

Another reason for automatic preservation of the employment relationship in these cases is to protect the property interests of the new employer, who is usually the general successor in the legal relationships of the original employer. The immediate departure of employees, who need not all agree to continue the employment relationship, could cause an employer not insignificant economic damages and in many business and institutions there would also be a danger of endangering the interests of third parties – customers and purchasers of goods and services – and a state of general emergency also can not be ruled out.

Understandably, the continuity of an employment relationship with a new employer is imaginable only if the other requisites of the employment relationship remain unchanged and correspond to the same conditions. This means primarily the kind of work, compensation for it, the place of performance of work or time conditions (the duration of the employment relationship, work hours and time of rest). Other working conditions are provided compulsorily and remain unaffected by a change of employer; for example, the rules for work safety.

In the event of a foreseeable and prepared change on the part of the employer, in certain outlined cases under the European standard, the law newly introduces certain obligations of the current employer: to inform employees or consult with trade unions. However, all this only confirms that it is standard practice for an employee to be transferred to another employer without his express consent, not only in the Czech Republic, but also in West European states.

Transformation of the private and public sector in the Czech Republic after 1990 was accompanied countless times by a change in the legal form of the employer. It is impossible not to refer to the extensive privatization of the Czech economy. In these cases the continuity of an employment relationship was never described as or understood to be the imposition of forced labor. Authoritative re-assignment of state officials to self-government units, i.e. only within the sector of the state power, is, in this regard, a change which, in view of its effects on the employee, is not among the most serious.

The opportunity to refuse to work for a new employer is, with regard to the employer's justified interests, adequately ensured by the employee's ability to give notice without stating a reason, which is accompanied by the obligation to work temporarily during a two month notice period. This can be considered proportionate, in view of the usual possibilities of an ordinary employer to find new employees.

The employee's obligation to work during the notice period represents a certain "tax" on employees for the legislative stabilization of employment relationships by a modern social state. Under these conditions the employer also deserves a certain stabilization in the area of employment relationships.

The Constitutional Court has not yet expressed an opinion on these aspects of the exercise of employment in terms of fundamental rights under Art. 9 of the Charter. The case law of the European Court for Human Rights also does not support the position of the group of senators, in reflecting Art. 4 of the Convention, which prohibits slavery or forced labor. Also, no authoritative interpretation going against the model foreseen by Act no. 320/2002 Coll. is presented in this regard in relation to the right to earn one's living in freely chosen employment under Art. 1 para. 2 of the European Social Charter. The Convention on Forced or Authoritative Labour (no. 29) of the International Labour Organization (no. 506/1990 Coll.), which is aimed at slavery and feudal practices and obligatory manorial labor can scarcely be seen as an obstacle to this model. Nor does a cursory foreign comparison help. The German Constitutional Court has not, in any case cited in the specialized publications, spoken unfavorably on the comparable German legal framework.

The following facts can be stated concerning the authoritative re-assignment of employees, officials of district offices, to municipal, city, and regional offices, which is prescribed by Act no. 320/2002 Coll.

The kind of work performed remains the same or comparable, the appropriate territorial self-governing unit steps into the position of the state as employer if the activity of the employee concerned is transferred to the jurisdiction of the territorial self-governing unit. Each particular case certainly depends on how the kind of work is defined in the employment agreement. The need for a consensual change in the kind of work is surely routine within the transfer of the exercise of state administration.

Payment conditions are preserved, and Act no. 143/1992 Coll., on Salaries and Compensation for Work Readiness in Budgetary and Some Other Organizations and Bodies, in the current version, will continue to apply.

In view of the fact that regional offices and city and municipal offices are usually located in different municipalities and cities than the terminated district offices, it will be common for bureaucrats to move. In all cases of authoritative re-assignment to a workplace in a different municipality, an agreement on a change in the place of performance of work after 1 January 2003 is necessary between the bureaucrat of the district office assigned to handle employment law relationships and the relevant employee.

A district office employee who rejects his re-assignment to an authorized territorial self-governing unit could have prevented it by giving timely notice of termination of his

employment relationship. The final schedule for termination district offices has been known half a year in advance, and the reform of the decentralized exercise of state administration has been under preparation even longer. In view of the qualification of the employees concerned, the bureaucrats of district offices, and in view of the role of district offices in implementing the reform, one can not agree that they have been insufficiently informed about changes which will affect them personally.

The authoritative re-assignment of district office employees in practice is described by the Ministry of the Interior's Method Instruction for the Implementation of the Transfer of Employees of District Office to Territorial Self-Governing Units of 9 July 2002, which expects that some of the employees of terminated district offices will refuse to transfer to a territorial self-governing unit in view of the change of workplace, and concludes that in such cases it is possible for the district office as employer to give termination notice on grounds of redundancy caused by organization changes. This Instruction also takes into account the need for a change in the kind of work performed, and emphasizes the necessity of an agreement between the employee and employer. In the absence of agreement there is here too the possibility of termination notice given to an employee on grounds of redundancy. For internal purposes the Ministry of the Interior selected an interpretation of the relevant provisions of Act no. 320/2002 Coll. that protects the position of the bureaucrats in terminated district offices above the constitutional or international standard, which can only be welcomed.

VII.

Objections concerning the failure to observe legal form point out the brevity of provisions of Act no. 320/2002 Coll., which do not expressly answer every question. For example, it is not evident to what extent, if at all, the Ministry of the Interior is bound by the proposal from the chairman of a terminated district office and the recommendation of the director of a regional office. An indication of how to resolve disagreements between the chairman's proposal and the director's recommendation is also lacking. The tasks of the regional office director and the expectations to which he is subjected are not easy; the director is supposed to simultaneously defend the interests of the region and the interests of the state in the exercise of state power by the region and in inspection of municipalities and cities in their exercise of state power.

The nature of individual decisions by the Ministry on the authoritative re-assignment of employees from terminated district offices to regions, cities and municipalities also appears to be disputed. The decisions – whether taken collectively for entire districts or regions or separately for individual departments and divisions and individual cities or municipalities – can best be characterized as collected legal acts; however, they are not normative acts, as they regulate the legal relationships of precisely specified natural persons (the re-assigned bureaucrats) and legal entities (the appropriate regions, authorized cities and municipalities). The source of law remains solely provisions of Act no. 320/2002 Coll.

Act no. 320/2002 Coll. does not provide more precise rules for how to take into account agreements under point 3 when preparing and issuing decisions on authoritative re-assignment. It is evident that authoritative re-assignment would occur anyway, in an extent which corresponds to the number of functions transferred, without regard to such consensus. Nevertheless, the legislature made possible agreements between the employee, the state (represented by the district office) and a territorial self-governing unit. It thereby opened room to apply the solution which best suits the parties. In view of the previously evident extent of the transfer of the exercise of state administration to territorial self-governing units, there are no grounds for concern that a territorial self-governing unit which was forthcoming in concluding re-assignment agreements would remain disadvantaged.

There is a danger of inequality perhaps in those cases of authoritative re-assignment where functions are divided not according to the population density of the administered territory, but according to the idiosyncrasies of its territory, population, economy and cultural and social situation. The projection of these facts need not always fully correspond to social needs, and then there is a danger of inequality arising between individual territorial self-governing units. However, the interference requested of the Constitutional Court out of fear of such cases appears premature and exaggerated.

A decision on authoritative re-assignment is reviewable by a court. As a decision by a body of state (public) administration, which decides on the entitlements and obligations of subjects of law (the affected bureaucrats, employees, and appropriate regions, cities and municipalities), it is subject to judicial review under Art. 36 para. 2 of the Charter, as neither Act no. 320/2002 Coll. nor any other statute expressly excludes a decision of the Ministry from judicial review. In view of the probable effect on fundamental rights and freedoms and fundamental principles of state organization, such exclusion would evidently be inconsistent with the Charter and the Constitution.

VIII.

After reviewing the case at issue and analyzing the matter in terms of the conformity of provisions of Act no. 320/2002 Coll. with the constitutional order, the Constitutional Court concluded that authoritative assigning of the exercise of state power to territorial self-governing units arising from the contested provisions, including the re-assignment of employees is compatible with the Constitution. The manner of financing the exercise of state power by territorial self-governing units, assuming that the state contribution will be sufficiently high for the performance of the assigned tasks, does not represent a danger to the autonomy of territorial self-governing units under the Constitution and the Charter of Local Self-Government. The authoritative re-assignment of employees from terminated district offices can not be seen as forced labor. The legal instruments introduced into the law in connection with the termination of district offices and the transfer of the exercise of state administration to authorized bodies of territorial self-governing units are acceptable from a constitutional viewpoint.

The contested provisions of Act no. 320/2002 Coll. were not found inconsistent with the constitutional order, as is required for making a finding of derogation by Art. 87 para. 1 let. a) of the Constitution of the Czech Republic no. 1/1993 Coll., as amended by constitutional Act no. 395/2001 Coll., and therefore the Constitutional Court denied the petition from the group of senators to annul points 2, 5, 6, 7, 8, 9 and 11 Art. CXVII of Act no. 320/2002 Coll., Amending and Repealing Certain Acts in Connection with Ending the Activities of District Offices, under § 70 para. 2 of the Act on the Constitutional Court.

Notice: Decisions of the Constitutional Court can not be appealed.

Brno, 5 February 2003