

2004/01/13 - PL. ÚS 38/03: MUNICIPAL ORDINANCE BAN

HEADNOTES

A municipality may issue a generally binding ordinance exclusively under its independent jurisdiction if there is interference in the rights and freedoms of citizens; limitation of this interference through a municipal ordinance is possible, while in transferred jurisdiction it issues directives on the basis of authorization in statutes and within the bounds provided by statute (§ 11 of Act no. 128/2000 Coll., on Municipalities, as amended by later regulations).

Under Art. 4 par. 2 of the Charter of Fundamental Rights and Freedoms the limits of fundamental rights and freedoms may be regulated only by statute and not by a municipal ordinance.

CZECH REPUBLIC CONSTITUTIONAL COURT JUDGMENT

IN THE NAME OF THE CZECH REPUBLIC

The Plenum of the Constitutional Court, composed of JUDr. František Duchoň, JUDr. Pavel Holländer, JUDr. Dagmar Lastovecká, JUDr. Jiří Malenovský, JUDr. Jiří Mucha, JUDr. Jan Musil, JUDr. Jiří Nykodým, JUDr. Pavel Rychetský, JUDr. Pavel Varvařovský and JUDr. Eliška Wagnerová, ruled in the matter of a petition from Mgr. Stanislav Gross, Minister of the Interior, to annul the generally binding ordinance of the town of Litoměřice no. 4/95, on Banning Communist, Fascist and Nazi Propaganda in the Town of Litoměřice, approved by the Litoměřice representative body on 6 April 1995 and in effect as of 3 May 1995, as follows:

Litoměřice town ordinance no. 4/95, on Banning Communist, Fascist and Nazi Propaganda in the Town of Litoměřice, of 6 April 1995, is annulled.

REASONING

On 28 July 2003 the Constitutional Court received a petition from the minister of the interior, Mgr. Stanislav Gross, to annul the generally binding ordinance of the town of Litoměřice no. 4/95, on Banning Communist, Fascist and Nazi Propaganda in the Town of

Litoměřice, approved by the Litoměřice representative body on 6 April 1995 and in effect as of 3 May 1995.

The contested ordinance reads:

*“ORDINANCE
no. 4/95*

on Banning Communist, Fascist and Nazi Propaganda in the Town of Litoměřice

The Litoměřice representative body, by resolution from its meeting on 6 April 1995, issues this generally binding ordinance.

§ 1

Communist, Nazi and Fascist propaganda is banned in the town.

§ 2

Communist, Nazi and Fascist propaganda means:

- a) Calls for a violent change of the constitutional order.*
- b) Using the symbols of these criminal movements when promoting them.*
- c) Questioning the criminal nature of the regimes which these movements represented.*

§ 3

The approved ordinance goes into effect on the fifteenth day after it is promulgated, i.e. 3 May 1995.

Deputy Mayor

Mayor

Ing. Milan Šlegř

Ing. Milan Tejkl”

Jiří Landa round stamp

The Ministry of the Interior received the generally binding ordinance after district offices were terminated and it took over their agenda as part of the transfer of jurisdiction in

supervising the lawfulness of municipal legal regulations. The Ministry of the Interior concluded that the generally binding ordinance in question is inconsistent with the law. The Regional Office of the Ústí nad Labem Region took the same position in its statement of 15 April 2003. In view of this, the Ministry of the Interior, by a measure of 5 June 2003, began administrative proceedings to suspend the ordinance. During the administrative proceedings the town of Litoměřice did not arrange a remedy in the matter, and therefore the Ministry of the Interior, by decision of 27 June 2003 file no. MS/1077/2-2003, suspended the generally binding ordinance. This decision was delivered to the Litoměřice Town Office on 30 June 2003, and on that day it entered into force under § 124 par. 2 of Act no. 128/2000 Coll., on Municipalities (Municipal Establishment), as amended by later regulations.

In its petition, submitted under § 64 par. 2 let. g) of the Act on the Constitutional Court and under § 124 par. 3 of Act no. 128/2000 Coll., on Municipalities (Municipal Establishment), as amended by later regulations, the minister of the interior states that the authorization for a municipality to issue generally binding ordinances on matters within the municipality's independent jurisdiction is enshrined in Art. 104 par. 3 of the Constitution of the Czech Republic (the "Constitution"), but at the same time it is constitutionally restricted to the effect that the independent municipal jurisdiction, within which a generally binding ordinance can be issued, may only be provided by statute (Art. 104 par. 1 of the Constitution). According to the petitioner, at the time the ordinance was issued, that statute was the then-valid Czech National Council Act no. 367/1990 Coll., on Municipalities, as amended by later regulations, which states in § 13 par. 2 that in exercising its independent jurisdiction a municipalities is guided only by statutes and other legally binding regulations issued by central bodies to implement them. Under § 16 par. 2 such ordinances must be consistent with statutes and these legal regulations. The sphere of matters entrusted to the independent jurisdiction of municipalities (towns) was provided by way of example in § 14 of the Act. At the time the generally binding ordinance was issued, it was inconsistent with § 14, § 16 par. 1 and § 36 par. 1 let. f) of the Act. After the Act was annulled, the generally binding ordinance became inconsistent with § 10, § 35 and § 84 par. 2 let. i) of Act no. 128/2000 Coll., on Municipalities. Issuing the ordinance in question also does not fall within the transferred jurisdiction of municipalities, as in that case at the time it was issued it would have been inconsistent with § 24 par. 1 of the then-valid Czech National Council Act no. 367/1990 Coll., on Municipalities, as amended by later regulations, a at present with § 11 par.1 of Act no. 128/2000 Coll., on Municipalities. In view of the fact that territorial self-government bodies can issue legal regulations only on the basis of statute and within its bounds and that the ordinance in question was issued without express statutory authorization and bans an activity which falls under neither the independent nor the transferred jurisdiction of municipalities, it is, according to the minister of the interior, also inconsistent with Art. 2 par. 4, Art. 79 par. 3 and Art. 104 par. 1 and 3 of the Constitution and Art. 4 of the Charter of Fundamental Rights and Freedoms (the "Charter").

The town of Litoměřice, in the mayor's statement of 18 September 2003, stated that it takes cognizance of the petition to annul the ordinance on Banning Communist, Fascist and Nazi Propaganda in the Town of Litoměřice, without responding to it.

The Ombudsman, who was sent a copy of the petition to annul the ordinance in accordance with § 69 par. 2 of the Act on the Constitutional Court, informed the Constitutional Court by official letter of 10 October 2003 that he would not join the proceedings.

Under § 68 par. 2 of the Act on the Constitutional Court, in its decision making the Constitutional Court reviews the content of a statute or other legal regulations in terms of consistency with constitutional statutes, and in the case of other legal regulations, also in terms of consistency with statutes; it determines whether they were passed and issued within the bounds of constitutionally provided jurisdiction and in a constitutionally prescribed manner. In this regard, the Constitutional Court determined from the record of the meeting of the town representative body held on 6 April 1995 v Litoměřice that the contested ordinance was approved at the meeting by 14 votes in favor, 5 votes against, and 6 abstaining. Because the municipal representative body then had 27 members, 2 of whom were not present at the meeting, we can state that the contested ordinance was passed in a correct manner (§ 38 par. 5 of CNC Act no. 367/1990 Coll. as amended by later regulations). The Constitutional Court also determined that the contested ordinance was duly posted on the official notice board of the Town Office in Litoměřice on 17 April 1995 and taken down on 4 May 1995, so it entered into effect on 3 May 1995 (§ 16 par. 3, 4 of the cited Act). Therefore, the Constitutional Court believes that the contested regulation was passed and issued in a constitutionally prescribed manner.

The Constitutional Court then considered the issue of active standing to submit a petition. After district offices were terminated, the authority to supervise the exercise of municipalities' independent jurisdiction was transferred to regional offices and the Ministry of the Interior (§ 123 et seq. of Act no. 128/2000 Coll., on Municipalities, as amended by later regulations), as was the authority to supervise the exercise of municipalities' transferred jurisdiction (§ 126 et seq. of the cited Act). Thus, the petition to annul the generally binding ordinance in question was submitted by an authorized person under § 124 par. 3 of Act no. 128/2000 Coll., on Municipalities and § 64 par. 2 letter b) of the Act on the Constitutional Court.

However, in the Constitutional Court's opinion, the contested ordinance was not passed and issued within the bounds of constitutionally provided jurisdiction, and it was inconsistent with the statutory framework of municipal establishment both at the time it was issued and after that framework was amended by Act no. 128/2000 Coll. as amended by later regulations. The Constitution, in Art. 104 par. 3, defines the power to issue generally binding ordinances so that municipal representative bodies can issue them only within the bounds of their jurisdiction. The ordinance in question was issued when CNC Act no. 367/1990 Coll., on Municipalities (Municipal Establishment), as amended by later regulations, was valid, which permitted municipalities to issue generally binding ordinances both in their independent and transferred jurisdiction. Independent municipal jurisdiction was regulated in § 14 of the cited Act as follows: paragraph 1 provided individual activities falling under independent municipal jurisdiction as examples, while paragraph 2 regulated independent municipal jurisdiction to the effect that a municipality also ensures, in its territory, economic, social and cultural development, and the

protection and creation of a healthy environment, and is not authorized to perform activities which special statutes entrust to other bodies as part of the exercise of state administration. A municipality could issue generally binding ordinances on matters falling under transferred jurisdiction only on the basis of authorization in a statute and within its bounds (§ 24 par. 1 of the cited Act). In view of the non-existence of such a special statute, establishing transferred municipal jurisdiction in this area, when it was issued the ordinance in question could not have been a generally binding ordinance issued under § 24 par. 1 of the cited Act. The ordinance in question is a norm which contains a ban on performing an activity which it calls “propaganda,” i.e. a norm establishing an obligation of natural persons or legal entities, limited only to the territory of the municipality of Litoměřice. The term “propaganda” must be interpreted as the public dissemination, defense and recommendation of certain thoughts, opinions or positions. Thus, the ban contained in the ordinance is directed into the area of freedom of speech defined in Art. 17 of the Charter as the right to express one’s views in speech, in writing, in the press, in pictures, or in any other form, as well as freely to seek, receive, and disseminate ideas and information irrespective of the frontiers of the state. Freedom of speech is also similarly enshrined in international treaties by which the Czech Republic is bound (Art. 19 of the International Covenant on Civil and Political Rights, promulgated under no. 120/1976 Coll. and Art. 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms promulgated under no. 209/1992 Coll.). Under Art. 17 par. 4 of the Charter freedom of speech and the right to seek and disseminate information may be limited only by law in the case of measures that are necessary to protect the rights and freedoms of others, the security of the state, public security, public health, or morals. The Czech Republic has already implemented such permissible limitation on freedom of speech and freedom to disseminate information through a statute [e.g. § 198a, § 260 and § 261 of the Criminal Code, § 15 par.1 of Press Act no. 46/2000 Coll. as amended by later regulations, § 31, § 32 par.1 let. b), c), e), and f) of Act no. 231/2001 Coll., on Radio and Television Broadcasting].

In its judgments, the Constitutional Court has repeatedly stated that independent municipal jurisdiction can not include the power to issue a generally binding ordinance which contains a ban on an activity which is essentially nothing more than a paraphrase of the elements of crimes set forth in, e.g. §§ 260 and 261 of the Criminal Code (cf. e.g., the judgment in file no. Pl. ÚS 42/95 in the Collection of Decisions of the Constitutional Court of the Czech Republic - volume 5., 1st edition, Judgment no. 47, Praha 1996 - part I., the judgment in file no. Pl. ÚS 43/95 Collection of Decisions of the Constitutional Court of the Czech Republic - volume 5., 1st edition., Judgment no. 60, Praha 1996 - part I, the judgment in file no. Pl. ÚS 45/95 in Collection of Decisions of the Constitutional Court of the Czech Republic - volume 5., 1st edition., Judgment no. 46, Praha 1996 - part I). Thus, by issuing an ordinance with this content, the town of Litoměřice exceeded the bounds of jurisdiction provided by the Constitution and CNC Act no. 367/1990 Coll., on Municipalities (Municipal Establishment), as amended by later regulations. The Constitutional Court adds that if a municipality wants to expressly manifest its political will in this regard, it can perhaps do so by other adequate means, but not by a normative act.

The basic starting point for the Constitutional Court's deliberations when reviewing the petition from the minister of the interior to annul the generally binding ordinance of the town of Litoměřice of 6 April 1995 was, in this case, the consideration of whether the ordinance in question was issued within the municipality's jurisdiction and whether it is consistent with the law and with the constitutional order. As in a number of similar cases, the Constitutional Court concluded that the ordinance in question was issued by the town of Litoměřice outside of its jurisdiction, established at the time in question by CNC Act no. 367/1990 Coll., as amended by later regulations, and then considered the issue of whether the municipality's lack of jurisdiction continued after amendment of the legal framework of municipal establishment by Act no. 128/2000 Coll., as amended by later regulations. It took as its starting point the principle that the wording of the legal framework valid at the time of the Constitutional Court's decision make is decisive for the court's deliberation concerning whether the generally binding ordinance is consistent with the law and with the constitutional order. That framework is now Act no. 128/2000 Coll., on Municipalities (Municipal Establishment), as amended by later regulations, which governs both independent municipal jurisdiction (§ 35 et seq. of the Act), and transferred municipal jurisdiction (§ 61 et seq. of the Act). Under the cited Act, a municipality can issue generally binding ordinances only in the sphere of its independent jurisdiction, while in the sphere of transferred jurisdiction it issues directives on the basis of statutory authorization and within statutorily specified bounds (§ 11). Under § 10 of the cited Act, a municipality can impose obligations through a generally binding ordinance only in enumerated spheres, or if a special statute so provides. The scope of independent municipal jurisdiction is defined in § 35 of the cited Act and § 84 of the cited Act, and neither of these provisions establishes municipal jurisdiction to limit the fundamental rights and freedoms, entrusted in Art. 17 par. 4 of the Charter exclusively to statutes.

Therefore, on the basis of the foregoing, the Constitutional Court concluded that the contested ordinance is inconsistent with Art. 104 par. 3 of the Constitution, and § 13, § 14 and § 16 par. 2 of CNC Act no. 367/1990 Coll., on Municipalities (Municipal Establishment), as amended by later regulations. After that Act was annulled, the generally binding ordinance became inconsistent with § 10, § 35 a § 84 par. 2 let. i) of Act no. 128/2000 Coll., on Municipalities (Municipal Establishment), as amended by later regulations. Without it being necessary to consider other grounds stated in the petition, the Constitutional Court ruled that the town of Litoměřice ordinance of 6 April 1995, on Banning Communist, Fascist and Nazi Propaganda in the Town of Litoměřice, is annulled as of the day this judgment is promulgated in the Collection of Laws (§ 70 par. 1 of the Act on the Constitutional Court).

Notice: Decisions of the Constitutional Court can not be appealed (§ 54 par. 2 of the Act on the Constitutional Court).

Brno, 13 January 2004