

REGULATION-MAKING COMPETENCE OF MUNICIPALITIES IN THE SLOVAK REPUBLIC (SELECTED PROBLEMS)

ABSTRACT

Author analyses selected problems connected with the regulation-making competence of municipalities. He points out the limits of the municipalities regulation-making defined by the Constitutional Court of the Slovak Republic, the implementation problems that reflect professional level of members of municipal councils. He deals with the exercise of a municipality mayor's suspension power in connection to the municipality by-laws, as well as potential subjects of a regulation-making initiative. He suggests the legislative solutions and gives the arguments for them. He uses the method of the constitutional-law-based analysis of the institutes and connections under research, complemented by the method of synthesis of obtained knowledge based on experience from practice of municipal self-governments (empirical method).

KEYWORDS: *municipality, regulation-making municipality, regulation, regulation-making initiative, municipality mayor's suspension power*

INTRODUCTION

The regulation-making is a significant and important competence of a municipality regulated directly in the Constitution of the Slovak Republic (hereinafter referred to as the Constitution of SR or the Constitution) in

Article 68 and Article 71/2. The basis of the constitutional regulation is a distinguishing between the competence of a municipality to issue generally binding regulations in the sphere of autonomous competence (so called self-governing regulations) and the ones in the sphere of transferred competence (so called administrative regulations). Based on Article 68 of the Constitution, in matters of territorial self-government and for securing the tasks of self-government provided by a law, a municipality may issue the general binding regulations. According to Art. 71/2, when exercising the powers of state administration, a municipality may issue generally binding regulations within its territory upon authorization by a law and within its limitations. This provides the principal difference from the point of view of orientation or purpose, between the constitutional basis for issue of general binding regulations of a municipality at the exercise of territorial self-government and at the exercise of transferred state administration. However, neither the Constitution of SR, nor Act No. 369/1990 Coll. on Municipal Establishment as amended by later regulations (hereinafter referred to as the Act on Municipal Establishment) makes no difference between self-governing regulations and administrative ones from the point of legislative process of their passing. Both types of regulations are passed by qualified three-fifth majority of present members of a municipal council and signed by the municipality mayor within the time limit determined by law.

DISCUSSION AND PROPOSALS OF SOLUTIONS

The problems of the municipal regulation-making are extensive from the point of view of their theoretical and legislative formulation and application practice and in order to pay them the detailed attention we would have to write down (maybe) tens of pages, what radically exceeds the capacity given to our paper. Taking the extent and title of the paper into account, we will only deal with some problem issues, which we consider to be worth of better precision in the Act on Municipal Establishment.

The problems of theoretical and practical nature are especially invoked by the implementation of a municipal regulation-making in the sphere of autonomous competence of a municipality, i.e. at passing and issuing of self-governing regulations. Taking the analysis of Art. 68 of the

Constitution as the basis, it can be concluded that it establishes the direct constitutional authorization for municipalities and the issue of generally binding regulations in matters of territorial self-government for securing the tasks of self-government provided by a law. As well, the authorization of a municipality, or its right to issue a generally binding regulation also results from the diction of the given article, i.e. only the municipality (its bodies) considers what it will use for securing of the tasks of territorial self-government – a regulation or other available forms and means. The authority to issue generally binding regulation is limited from the point of view of competence, as it results from the provision “in matters of territorial self-government and for securing the tasks of self-government provided by a law” (Palúš, Jesenko, Krunková, 2010).

Based on the given interpretation, we may conclude that, pursuant to Art. 68 of the constitution, the municipalities have at their disposal the original regulation-making with all its components, in the sphere of autonomous competence, i.e. they may regulate social relations, which have not been regulated yet (*praeter legem*) and they are eligible to set new legal obligations within the social relations in relation to municipality inhabitants (or to legal entities) without a specific statutory authorization. However, the situation is much more legislatively complicated and substantially more complex in practice due to relatively rich judicature of the Constitutional Court of the Slovak Republic, which has determined and formulated several important decisions in relation to regulation-making authority of a municipality in the sphere of autonomous competence, which, as a whole, represent the constitutional limits of municipal regulation-making in the given sphere.

On one hand, the Constitutional Court acknowledges the original nature of regulation-making of municipalities with reference to the direct constitutional authorization to issue generally binding regulations, but, on the other hand, it states: “the Constitution does not acknowledge the regulation-making authority for municipalities within the whole scope of internal matters, which they administer pursuant to Art. 4 of the Act on Municipal Establishment. They may apply the regulation-making authority in this part of administration of their internal matters only, by which they implement the territorial self-government pursuant to Art. 65/1 of the Constitution¹.

If the law-maker grants them specific authorization for the regulation-making activity, they also will be entitled to regulate other relations by the generally binding regulation beyond this constitutional provision”².

Another problem, or the constitutional limit, in relation to a municipality regulation-making, consists in the decisions of the constitutional court restricting the municipalities in setting of “new” legal obligations by generally binding regulations. The limits laid down in this way bring about doubts also in theoretical and legal aspect, since individual decisions of the constitutional court in this matter are not always explicit and identical. In principle, they can be formulated in such a way that the municipalities may impose legal obligations to natural and legal persons in their generally binding regulations pursuant to Art. 68 of the Constitution only upon consistent observance of the constitutional limits (especially the observance of the contents of Article 2/2,3 and Article 13/1 of the Constitution), while, in actual fact, the obligations represent the detailed specification of the obligations stated in the Constitution and acts according to the local conditions, not new obligations.

It is undoubtedly correct, when the constitutional court makes up the constitutional regulation of municipality regulation-making by its decisions, but it is necessary to realize that the regulation (not always explicit and identical) is launched by thousands of members of municipal councils and hundreds of mayors and most of them (of course) have no juridical education. This fact is reflected by the level of municipal regulation-making, which could be interestingly described by prosecution bodies or courts. In this situation, we consider necessary to precise the regulation of municipal regulation-making in the Act on Municipal Establishment in the sphere of autonomous competence from the point of view of its subject and especially from the point of view of determination of criteria that allow to set the obligations through generally binding regulations to their addressees. We are convinced that it would be useful for the level and seriousness of generally binding regulations issued by municipalities within the autonomous competence.

In practice, there is sometimes problem to distinguish, when a municipality exercises the regulation-making competence pursuant to Article 68 of the Constitution (self-government regulations) and when it is pursuant to Article 71/2 of the Constitution (administrative regulations). The core of the

problem consists often in incorrect distinguishing of self-governmental tasks of a municipality and its tasks at the execution of local state administration. According actual knowledge of municipalities, the disputes arise especially as a result of the fact that acts set certain tasks for municipalities also in the sphere of territorial self-government, while supervision bodies of the state (prosecution bodies) consider these statutory tasks to be the statutory authorization pursuant to Article 72/2 of the Constitution. It is obvious that the way how to precede the misunderstanding consists in the more detailed content specification of Article 68 of the Constitution (Čič, 2012).

The problem component of a municipality regulation-making is the exercise of suspension right by a municipality mayor. The core of the problem is whether the mayor of a municipality, who signs resolutions and regulations adopted by municipal council, is entitled to exercise the suspension right to the resolutions only (Prusák, Škultéty, 1999), or also in connection to the municipality regulations (Kukliš, Virová, 2012). Differences in opinion occur not only in legal publications, but – unfortunately – also in implementation practice. The mayors of municipalities, members of municipal councils, chief controllers of municipalities, as well as prosecution bodies that perform a supervision over the observance of rule of law in municipal self-government, have different approach to the given problem.

We hold the view, according to which a mayor may apply the suspension right under the statutory conditions to the resolutions of the municipal councils only. The generally binding regulations of the municipality are thus excluded from its suspension right. The following facts are to support our opinion.

In the first place, we want to draw attention to the principal difference between the legal nature of the content of generally binding regulations of a municipality and the resolutions of the councils of the given municipality (hereinafter referred to as resolutions). The regulations of a municipality are normative legal acts, they contain legal norms as generally binding rules of behaviour containing certain orders, bans or permits in relation to their addressees. On the other hand, the resolutions are not of normative legal acts nature, they do not present legal sources in formal sense and do not contain legal norms. They only contain organizational standards which bind in relations oriented into the municipality.

The resolutions and regulations are legal acts through which a municipal council implements its competence. Since the council is a collective body, it always takes decisions as a board, while it has a quorum only if overall majority of all its members is present at the session. It results from the above-mentioned that the council settles on adoption of resolutions and regulations. However, taking abovementioned legal nature of both legal acts into account, there is statutory difference in the way of their adoption. While to pass the resolution, overall majority of present members is needed, to pass the regulation, three-fifths majority of the same quorum is necessary, i.e. the qualified majority of the present members.

It is true that a municipal council settles on regulations (Section 11/4/g of the Act on Municipal Establishment), however this “settling on” is to be perceived as a process procedure of a municipal council, the result of which is an adoption of a regulation of the municipality as a normative legal act. In other words, from the legal point of view, it is not possible to perceive synonymously the resolution of the council as legal act with settling on of the municipal council as a process form of its operation (Dudor, Hašanová, Andorová, 2013). In accordance with this statement, we hold the opinion that provision of Section 13/6 of the Act on Municipal Establishment (“the mayor may suspend the exercise of the municipal council resolution...”) is to be interpreted literally and it may not be extended by an extensive interpretation to a regulation of a municipality. We assume that if law-maker had had in mind the application of the suspension right also towards the regulations, he would have explicitly stated this fact in the act (similarly like in Section 12/11 of the Act on Municipal Establishment is explicitly stated that municipality mayor signs resolutions and regulations approved by municipal council).

The second group of arguments supporting our opinion is represented by the principle of power division under the conditions of municipal self-government (Palúš, 2013). Within the given principle, the suspension right of the municipality mayor represents one of the significant means of its implementation. If the municipality mayor uses it towards a resolution of the municipal council under the statutory conditions (Section 13/6 of the Act on Municipal Establishment) and the council subsequently breaks it by three-fifths majority of all its members, the analysed right of the municipality mayor, or its implementation, represents

the significant function of a brake or counterweight of executive power (mayor) towards the regulation-making power (council) and vice versa. If the council breaks the suspended resolution and the mayor denies to sign it despite this fact, referring to the mayor's position of a statutory person (there are such cases in the practice), there is no solution in the Act on Municipal Establishment how to solve such situation. Under such circumstances, the suspension right of the mayor exercised towards the regulation of the municipality will not act as a mean heading to the division and control of power, but as a mean that allows a power concentration, or a cumulation of executive and regulation-making activity in the municipality mayor's hands.

Also Act on Prosecution (No. 153/2001 Coll. on Prosecution as amended by later regulations) confirms our considerations about the fact that a municipality mayor must not suspend the execution of the municipality council regulation, since the given act clearly distinguish between legal nature of a resolution and a regulation of a municipal council. This difference is obvious when a prosecutor's protest is handled, where law distinguishes the effects of the protest depending on the fact whether the protest is filed against a generally binding legal regulation (thus, also municipality regulation) or against a measure or decision of a body of public administration (including a resolution of a municipal council).

In the first case, i.e. if a prosecutor files a protest against a municipality regulation and the protest is not successful, the general attorney will be entitled to make a motion for the commencement of legal proceedings about the compliance of legal regulations on the Constitutional Court of the Slovak Republic (it is necessary to add for completeness that pursuant to the Constitution, the general attorney is entitled to make such motion always, i.e. also in the case if a prosecutor does not file any protest against a municipality regulation). In the second case, i.e. if a prosecutor files a protest against a resolution of a municipal council and the protest is denied, the prosecutor may make a motion for the commencement of legal proceedings on a general court, which will give a ruling for the matter.

We hold the opinion that law-maker would clearly declare in the law that a municipality mayor cannot exercise a suspension right towards generally binding regulations of the municipality so as to respect the principles of a legal state from the point of view of creation of legal regulations and their

subsequent explicit application. We are convinced that such a course of action of law-maker would have a positive influence on seriousness and trustworthiness of a municipality regulation-making and most importantly, it would remove existing application diversity, which has negative impacts in the practice of municipal self-governments.

In connection with municipality regulation-making, we want to take a stand on one more problem. Act on Municipal Establishment does not explicitly determine (nor ban), who can propose a municipality regulation, i.e. who can have a regulation-making (legislative) initiative. The municipalities approach differently to this matter and thus it is possible to see that in addition to members of municipal councils and municipal mayors, the regulation-making initiative is within the competence – on the basis of the decision of the given municipality – to committees of a municipal council, municipal board, chief of a municipality office, as well as to legal entities or organizations established by the municipality.

We suppose that also in this case, the Act on Municipal Establishment would be a unifying component and it would award the regulation-making initiative to two subjects – to members of a municipal council and a municipality mayor. The quoted acts awards indirectly the regulation-making initiative to members, when pursuant Section 25/4/a, they are entitled to submit proposals to a municipal council and other bodies of the municipality. There are at least two reasons for awarding a municipality mayor the regulation-making initiative. The first one – pursuant to the Act on Municipal Establishment, the mayor calls, presides and ends the session of the municipal council, i.e. he directly participate in the process of discussing and adopting of a generally binding regulation of the municipality. The second reason, from which it is possible to deduce a position of a mayor as a proposer of a municipality regulation is based on constitutional position of a mayor according to which it is the highest executive body of a municipality. Analogously it is possible to conclude that a mayor as the highest executive body of the municipality has a similar position in the process of municipality regulation-making process as the government (the supreme body of executive power) within the process of law-making process, where it disposes of the law-making initiative and submits the substantial number of bills.

CONCLUSION

The system of functioning of a representative democracy – the component part of which is a municipal self-government – requires at least such a precision of legal regulation at local level as the law-maker devotes to the regulation of the institute on the central level. This statement fully relates to the sphere of regulation-making competence of a municipality, the principal imperfection and problem of which is its general and non-explicit legal regulation. Along with the unbalanced relation of democracy and professionalism of members of municipal councils and mayors, it results in a whole range of problems in the practice of municipal self-governments and the significance of municipality regulation-making is considerably relativized.

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Endnotes

- ¹ Pursuant to Article 65/1, a municipality is legal person, which manage its own property and its financial means independently, under the conditions laid down by a law.
- ² Finding of the Constitutional Court of the Slovak Republic from May 13 (1997). File No. II. ÚS 19/97.