



**REPUBLIKA SLOVENIJA**  
**USTAVNO SODIŠČE**

U-I-285/94  
30 March 1995

**R E S O L U T I O N**

In a procedure to assess constitutionality initiated at the request of the Executive Council of the Municipality of Krško and the National Council, at a session held on 17 March 1995 the Constitutional Court passed the following

resolution :

The first paragraph of Article 101 of the Law on Administration (Official Gazette RS, No. 67/94) and the third paragraph of Article 99a of the Law on Local Government (Official Gazette RS, Nos. 72/93, 57/94 and 14/95) are annulled. The annulment shall take effect on 1 June 1995.

Reasons :

A.

1. In the opinion of the first proposer (the Executive Council of the Municipality of Krško) the provision of the first paragraph of Article 101 of the Law on Administration (hereinafter : LA) transfers to the state all the functions of the former municipalities, which in its opinion is not in accordance with Article 140 of the Constitution. In Article 21 of the Law on Local Government (hereinafter : LLG), some of the basic municipal assignments were specified, but not also itemised, which, in the opinion of the proposer, enables the state to take over all the tasks of the new municipalities by applying the contested provision of the LA. The original competencies of the municipalities should, in its opinion, be defined by the legislation for that particular field, which will not be adopted before the transfer of the tasks from Article 101 of the LA takes place. Therefore it proposes that the Constitutional Court annul the disputed provision or, in accordance with Article 48 of the Law on the Constitutional Court (Official Gazette RS, No. 15/94, hereinafter : LCC), adopt a ruling to establish conflict with the Constitution.

2. The second proposer (the National Council) also based its allegations of unconstitutionality of the contested provision on Article 140 of the Constitution and Article 21 of the LLG, and pointed out that the Law on the Organisation and Field of Work of Ministries (Official Gazette RS, No. 7/94) specifies the competencies of individual ministries in very general terms, which in its opinion is why it cannot be said that the contested LA provision does not mean the transfer of all municipal administrative matters to the competent ministries. Even if the contested provision is nothing more than a temporary solution, needed because not all legislation in this field has been adopted yet, in the opinion of the National Council this still signifies state interference in local matters, which, because of the simultaneous takeover of administrative employees, would completely disable the successful execution of municipal administrative matters.

3. The National Assembly in its reply stated that the contested provision must be explained within the context of the entire LA, of which it is part, and in connection with Article 5 of the Enabling Statute for the Implementation of the Constitution of the Republic of Slovenia (Official Gazette RS, No. 31/91), which stipulated that municipal bodies perform state functions until such time as they are taken over by the state, and extended the mandate terms of the bodies of previous municipalities until 31 December 1994. It is therefore alleged that the contested provision regulated only the transfer to state administration bodies of those state functions in the field of administration which, until the aforementioned date, were performed by the old municipal bodies. For this reason the National Assembly claimed that it does not interfere with local affairs which, pursuant to Article 140 of the Constitution and Articles 21 and 22 of the LLG, are within the competency of the new municipalities,

nor does it transfer local administrative affairs from the competency of the new municipalities to the competency of the state's administrative bodies.

4. The National Assembly emphasised that the fundamental meaning of the contested provision lies not in a division between state and local administrative matters but in transferring state functions in the field of administration previously performed by the old municipalities to the administrative units, except for the surveyor's office, administrative supervision and tasks in the field of defence which are directly transferred to the competent ministries. The division between state functions in the field of administration and local administrative matters should not be a matter for the LA but for legislation in this field. In its opinion, the takeover of state functions in the field of administration pursuant to Article 101 of the LA with a general clause is cleanest and clearest, and should exclude any arbitrariness in the assessment of what might be of local or of state importance in an individual field. It believes that applying the different approach proposed by the legislative procedure, i.e. the method of listing actual competencies, could lead to incomparably greater risk because mistakes could occur during the itemisation as well as an arbitrary understanding of the division of tasks.

5. At a public debate on 17 March 1995 the participants insisted on their claims as contained in the petition for an assessment of the constitutionality of the first paragraph of Article 101 of the LA and in the reply to the petitions. The proposers reiterated that the contested provision means the transfer of all the tasks of the former municipalities to the state. During this process differences in explanation appear which cause a confusion that will result in an increasing number of disputes over competency.

The representative of the National Assembly insisted that the contested provision of the LA should not be controversial as a method of "en bloc" transfer of tasks from the municipalities to the state. Only specific examples of tasks that have been transferred within this "package" could be disputed and demonstrated to be local matters.

6. The Constitutional Court obtained from the municipalities and administrative units information as to how the contested provision is being implemented, and particularly on whether, after 1 January 1995, the municipalities issued any administrative decrees and, if so, in which fields, who they were issued by and which is the competent appeal body.

## B.

7. The principle of local government was included among the basic constitutional provisions and analysed in detail in a special chapter on local and other government. The basic constitutional guarantee on local government ("The autonomy of local government shall be guaranteed in Slovenia." Article 9 of the Constitution) is the institutionalised framework for decision-making on local public matters and also the basic constitutional right of each person to participate in the administration of public affairs (Article 44 of the Constitution). Similarly, the European Charter on Local Government, in the preamble, directly juxtaposes the following three provisions :

- that local authority is one of the main foundations of every democratic government,
- that the citizens' right to participate in public matters is one of the democratic principles common to all member countries of the Council of Europe, and
- that this right can be most directly exercised at the local level.

Based on these key principles the European Charter, in Article 3, develops a definition of local government as "the right and the ability of the local authority to regulate within the limits of the law and to carry out an essential part of public affairs within its own jurisdiction and for the benefit of the local population."

8. In Resolution U-I-13/94 of 20 January 1994 (Official Gazette RS, No. 6/94), which annulled Article 95 of the Law on Local Government, the Constitutional Court stated that the basis for the constitutional and legal provision on local government is the establishment and securing of the basic conditions for local government following several decades of the "Yugoslav commune".

This basic objective can be realised by :

- forming areas and boundaries of new municipalities; - the state taking over the execution of state administrative matters,
- the competencies of new municipalities being defined,
- representative and executive bodies of the municipalities being formed, which should give the citizens the right to local democracy, which means cooperation in decision-making on local matters within a self-governing municipality.

The Constitutional Court has therefore quite clearly stated that in the transition in the system of local government the National Assembly must separate and define the competencies of the state and of the local communities.

9. The introduction of local government also signifies the state taking over the state functions which in the commune system were performed by the municipalities as an extension of state authority. The takeover of those administrative tasks that are connected with the execution of local government or local public matters and which the municipalities, like the state, perform as an authority would be contrary to Article 140 of the Constitution. In relation to the state and to its inhabitants the municipality is the local authority. This is also indirectly based on the three provisions of the European Charter on Local Government referred to in the preceding point. The first talks about local authorities, which are one of the main foundations of any democratic government, the second and the third about the democratic principles of citizens' participation in the administration of public matters, both at the central and the local level, the difference being that at the local level it is done "more directly".

10. The contested first paragraph of Article 101 of the LA stipulates that on 1 January 1995 the state is to take over from the municipalities all administrative tasks and competencies in the fields for which individual ministries were founded, and for all other administrative tasks specified by law of an authoritative nature within the competency of municipalities.

11. According to the statement by the National Assembly the contested provision of the LA is just a norm for the implementation of Article 5 of the Enabling Statute for the Implementation of the Constitution. This article stipulates that until such time as the state takes over state functions these functions are to be performed by the municipal bodies. Its execution therefore requires a precise division between the competencies of the state and the competencies of local communities. This is possible only if the state functions which are to be taken over by the state, or the competencies that remain as original for the local communities, or both, are specified.

12. However, this was not done by the National Assembly. Instead of a clear division of competencies and a definition of the state functions to be taken over by the state, it passed the contested provision with its unclear content, which in the explanation of the National Assembly means that with this provision all state functions in the field of administration and previously performed by the old municipalities are to be transferred to the state administrative bodies. Its decision originated in the presumption that the mere fact that the competencies of the old municipalities were prescribed by law means that they are state and not local matters. In so doing the National Assembly interfered with the competency of the municipalities in contradiction to Article 140 of the Constitution. Ministries are founded for all areas of public life in society, including those which, pursuant to Articles 21 and 22 of the LLG, belong among local matters (for example, social care, education, health care, culture, tourism, commercial public services).

13. The National Assembly in its reply to the request for an assessment of the constitutionality and legality of the contested provision stated that the takeover of state tasks with a general clause creates clean relations between the state and local government and that it will be necessary for each law passed after 1 January 1995 to assess which tasks are by their nature such that they are judged to be local matters within the competency of the municipalities - all or just urban municipalities - pursuant to Articles 140 and 141 of the Constitution and Articles 21 and 22 of the LLG. This means that the

National Assembly in the same reply first claims that the contested provision does not interfere with the original competencies of the local communities and then that with the contested provision it transferred to the state even those tasks that will be transferred back to the municipalities, not as transferred tasks but into their original competency.

14. The implementation of Article 5 of the Enabling Statute for the Implementation of the Constitution therefore requires a definition of state functions and, as part of this, of the administrative tasks and competencies to be taken over by the state or its bodies. Only in this way will the takeover of state functions ensure the effective functioning of local government on the one hand and respect for the principle of a state governed by the rule of law and the principle of legal protection on the other.

15. In practice this has led to inequalities in the extent of assumed municipal administrative tasks and individual municipalities performing certain tasks as municipal which in other municipalities are performed as state tasks. Such a situation is legally intolerable as it causes legal disorder and threatens legal protection in the exercise of rights and the regulation of legal relations belonging within the competency of the state administration or local government bodies.

16. The takeover of competency with the general provision of Article 101 of the LA conflicts with the principles of the rule of law and the separation of powers, which require a normative division of competencies by individual fields of administrative functions and tasks with one or several law, since the provisions on competency are in effect an authorisation to a certain body to make decisions on individual administrative matters.

17. During the procedure to assess the constitutionality of the contested provision of the LA, changes and amendments were made to the LLG (Official Gazette RS, No. 14/95). The new Article 99a regulates the validity of the regulations of the former municipalities and the competencies for changing them, and in the third paragraph it stipulates that the competencies of the bodies of the former municipalities to regulate and execute matters of state competency, as stipulated in laws and other state regulations, are not transferred to the bodies of the new municipalities. Since these provisions are connected to the contested Article 101 of the LA, in accordance with Article 30 of the LCC, the Constitutional Court decided to assess their conformity with the Constitution.

18. The provision of the third paragraph of Article 99a of the LLG is unclear. It stipulates that the competencies of the bodies of the old municipalities determined by laws and other state regulations on the regulation and execution of matters of state competency are not transferred to the bodies of the new municipalities. This means that the competencies of the old municipalities, which necessarily includes original competencies, are transferred to the state, as the notion of "matters within state competency" is not defined by any regulation. Therefore the Constitutional Court assessed that this provision is not in accordance with Article 120 and 140 of the Constitution.

19. The Constitutional Court annulled both provisions with postponed effect in order to preserve the level of legal protection achieved. An annulment with immediate effect would, in its opinion, further aggravate the situation that was created on the basis of the actual implementation of the contested provision.

20. The Constitutional Court opted for annulment with postponed effect in order to mitigate the consequences of the annulment of Article 101 of the LA which would come about if all municipal tasks were immediately transferred to the new municipalities.

Not all of them are ready to take over the functions yet since statutes and other general acts have not yet been adopted nor has administration been organised. Citizen's legal protection would be compromised by repeated (temporary) organisational and personnel reorganisation due to temporary transfer of competency. The Constitutional Court also assessed that temporarily preserving an otherwise unconstitutional situation, which arose on the basis of the actual implementation of Article 101 of the LA, until the division of competencies in accordance with this resolution, ensures at least the level of legal protection achieved, which, inasmuch as it has been in accordance with Article 140, has been achieved on the basis of the past actual division of functions or competencies between the state and local communities.

21. A further reason why the Constitutional Court adopted the annulment with postponed effect was so that the National Assembly could, within that period, replace the annulled provisions by defining individual competencies and tasks to be taken over by the state. In so doing the Constitutional Court expects :

- the transfer of tasks in all municipalities to be accomplished at the same time,
- the special constitutional status of urban municipalities to be taken into account,
- the validity of individual acts issued in the period before the takeover by local community bodies of the execution of local matters on the basis of a legal division of competencies to be clarified,
- that local communities be provided with the necessary time for the adjustment of municipal acts, bodies and municipal administration,
- that the organisation of municipal administration including job types is conditioned by the competencies of the municipalities,
- the position of the employees with regard to possible changes in the extent of the competencies of the administrative units and the municipal administration to be resolved.

22. If by 1 June 1995 the National Assembly has not defined the competencies in the sense of this Resolution, on the day of the annulment taking effect on the basis of Article 140 of the Constitution and on the basis of Articles 21 and 22 of the LLG, the municipalities will themselves take over the performance of those administrative tasks that belong within their original competency.

#### C.

23. The Constitutional Court passed this Resolution on the basis of Article 43 of the Law on the Constitutional Court at a session composed as follows : chairman Dr Tone Jerovšek and judges Dr Peter Jambrek, Matevž Krivic M.Law, Janez Snoj M.Law, Dr Janez Šinkovec, Dr Lovro Šturm, Franc Testen, Dr Lojze Ude and Dr Boštjan M. Zupančič. The Resolution was passed with eight votes for and one against. Judge Krivic voted against and gave a separate negative opinion. A separate positive opinion was promised by judge Testen.

Chairman  
Dr Tone Jerovšek