

Creation of municipal secretariats: Unconstitutionality of art. 43 of the Organic Law of Municipalities of the State of São Paulo

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Creation of Municipal Offices: Unconstitutionality of Section 43 of the Organic Law of the State of São Paulo's Municipalities

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DOI: <https://doi.org/10.48143/rdai/11.cab.mello>

Keyword: Organic Law of Municipalities of the State of São Paulo, Secretaries in Municipalities, Unconstitutionality, organization of local services, municipal organization

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Unconstitutionality of art. 43 of the Organic Law of Municipalities of the State of São Paulo

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The Organic Law of Municipalities of the State of São Paulo (complementary decree-law no. 9, of 12.31.1969), in its art. 43, only admits the existence of Secretaries in Municipalities with a population greater than 150 thousand inhabitants and whose revenue exceeds 30 million cruzeiros. Such a provision does not need to be addressed by the Municipalities as it is a flagrantly unconstitutional rule, which undermines the principle of municipal autonomy and subverts the reciprocal respect that must exist between legal entities of legal capacity of political capacity in the Brazilian constitutional system. Art. 15 of the Brazilian Magna Lei, reproducing, as it is notorious, the content of previous Constitutions: "Municipal autonomy will be ensured: I - by the direct election of Mayor, Vice-Mayor and councilors held simultaneously throughout the country, on a date other than the general election for senators, federal deputies and state deputies; and II - by the proper administration that respects its peculiar interest, especially regarding: a) the decree and collection of taxes within its competence and the application of its rents, without prejudice to the obligation to render accounts and publish balance sheets within the deadlines established by law; and b) the organization of local public services". The canon in question, fundamental in Brazil because it defines the country's state structure and corresponds to a long republican tradition - which, moreover, has done nothing but enshrine the Municipality's eminent role since the beginning of the country's colonization - cannot be violated by whoever it is and its transgression by the States, because it is very serious, even opens the door to federal intervention, as provided in art. 10, n. VII, "e", of the Brazilian Constitution: "The Union will not intervene in the States, except for: VIII - to

demand the observance of the following principles: (...) e) municipal autonomy”. As you can see. Municipal autonomy was, in the constitutional text, expressly erected in “principle”, mandatory for the Union and States.

It is understood by principle to be available, express or implicit, of a categorical nature in a system, which conforms to or conforms to the norms implemented in a given legal-positive order. Com efeito, na lição magistral by Juan Manuel Teran, “Every category is logically a concept under which a series of notions and concepts are ordered. Every category is a basic concept in as much as it includes others. There is a concept as a category, inasmuch as other concepts are subordinated to or from it ... In other words, only the fundamental concepts in relation to a certain order are categories; it is to decide, when they serve as support for understanding within a certain sphere”(“ Philosophy of Law ”, 1952, Editorial Porrúa, Mexico, p. 87). Princípio é, pois, by definition, the core mandate of a system, truly alicerce dele, fundamental disposition that radiates over different norms, composing their spirit and serving as a criterion for their exact understanding and intelligence, precisely because it defines the logic and rationality of the normative system, giving it the tonic that gives it harmonic meaning. The relevance of constitutional principles and their supremacy, over ordinary or even constitutional norms, has been admirably learned and expounded by Agustin Gordillo in the following luminous words: eso; although the norm is a framework within which there is a liberated nature, the principle has integral support. The simple constitutional norm regulates the procedure that is produced by other inferior norms (ley, regulation, sentence) and eventually its content: but that determination is never complete, since the superior norm cannot bind in every sense and in every direction the act by which it is executed; The principle, on the other hand, determines in an integral way what the substance of the act by which it is performed must be.

“The norm is limit, the principle is limit and content. The norm gives the law the power to interpret or apply it in more than one sense, and the administrative act the power to interpret the law in more than one sense; but the principle establishes an estimative direction, an axiological sense, of evaluation, of spirit. The principle requires that both the law and the administrative law respect its limits and also have the same content, follow the same direction, carry out the same spirit. "But even more, these basic contents of the Constitution govern all community life and not only the acts to which they most directly refer or the situations that they most expressly contemplate"; (“Introduction to Administrative Law”, 2nd ed., Abeledo Perrot, 1966, pp. 174-177). Eis, pois, that since municipal autonomy is expressly figured in the system as a “constitutional principle” it is in the light of it that simple constitutional rules and infraconstitutional legislation will be interpreted. Any provision, any legal rule concerning the Municipality, in order to be constitutional, needs to be in tune with the principle of the Municipality's autonomy, "realize its spirit", meet "its estimated direction", coincide with its "axiological sense", express its content. A constitutional rule cannot be correctly understood without attention to the principles enshrined in the Constitution and a law that violates a principle adopted by the Magna Law cannot be tolerated. any legal rule concerning the Municipality, to be constitutional, needs to be in tune with the Municipality's autonomy principle, "realize its spirit", meet "its estimated direction", coincide with its "axiological sense", express its

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Violating a principle is much more serious than breaking a rule. Inattention to the principle implies offense not only to a specific mandatory commandment, but to the entire system of commands. It is the most serious form of illegality or unconstitutionality, depending on the level of the violated principle, because it represents an insurgency against the whole system, subsidization of its fundamental values, contuselia irreversible to its logical framework and corrosion of its master structure. Now, the Brazilian Constitution firmly states, in art. 15, which guarantees "municipal autonomy" and emphasizes: "especially regarding the organization of local services". Not only in this is autonomy guaranteed, but especially in this, that is, especially in this. Organizing local services means disposing of their structure, agents, bodies, authorities, assignments and general means to provide them. In the exercise of its own competence, the Municipality, when organizing local services, may create Municipal Secretariats in charge of providing them. How, then, could the Organic Law of Municipalities, without outrageous violence to the Brazilian Constitutional Carla, prevent local services from being organized at that time, in the ill-fated art. 43, that the creation of Secretaries is prohibited to municipalities that do not have a certain number of inhabitants and a certain revenue? The aforementioned provision unquestionably attacks the autonomy of the Municipalities by intending to evade an attribution expressly conferred by the Major Law. can create Municipal Secretariats in charge of providing them. How, then, could the Organic Law of Municipalities, without outrageous violence to the Brazilian Constitutional Carla, prevent local services from being organized at that time, in the ill-fated art. 43, that the creation of Secretaries is prohibited to municipalities that do not have a certain number of inhabitants and a certain revenue? The aforementioned provision unquestionably attacks the autonomy of the Municipalities by intending to evade an attribution expressly conferred by the Major Law. can create Municipal Secretariats in charge of providing them. How, then, could the Organic Law of Municipalities, without outrageous violence to the Brazilian Constitutional Carla, prevent local services from being organized at that time, in the ill-fated art. 43, that the creation of Secretaries is prohibited to municipalities that do not have a certain number of inhabitants and a certain revenue? The aforementioned provision unquestionably attacks the autonomy of the Municipalities by intending to evade an attribution expressly conferred by the Major Law. that the creation of Secretaries is prohibited to municipalities that do not have a certain number of inhabitants and a certain revenue? The aforementioned provision unquestionably attacks the autonomy of the Municipalities by intending to evade an attribution expressly conferred by the Major Law. that the creation of Secretaries is prohibited to

municipalities that do not have a certain number of inhabitants and a certain revenue? The aforementioned provision unquestionably attacks the autonomy of the Municipalities by intending to evade an attribution expressly conferred by the Major Law.

Not even the state Constitution - which, in fact, was zealous with regard to municipal autonomy - could not confront the autonomy of the Municipality. This is exactly what the eminent Victor Nunes Leal affirms, invoking a lesson from Pontes de Miranda: "Pontes de Miranda, although referring to one of the municipal powers, states the following opinion that our developments can be considered necessary consequences: ' The municipalities cannot yet be deprived by the State Constitution of the competence to organize their services ("Problems of Public Law", Ed. Forense, 1960, p. 166). In no way can the Organic Law of Municipalities take away from any municipality, however small, the right to organize their local services, regardless of the administrative basis that inspired the measure. Indeed, the purpose happens, to the fiveleta, the precious teachings of the illustrious JH Meirelles Teixeira: "Above the general interest, very justified, on the part of the State, in which all the Municipalities are managed according to the interest of its inhabitants and rationally organize their administrations, it is found the local interest in self-organizing, that is, in structuring the administration itself according to the needs, contingencies and possibilities "(" Studies of Administrative Law " , vol. I. 1959, p. 364). In effect, there is no state judgment in this regard when there is a constitutional judgment expressed in the Brazilian Constitution, which, faithful to the existing guidance since 1891, and later reinforced in more incisive texts, enshrined the Municipality's right to organize local services as private competence and exclusive. So precise are the lessons of the masters in the matter and so abundant are their teachings that, in themselves, they defend the exposed thesis, as if they were the indoctrinators themselves to rise up against the staggering art. 43 of the Organic Law. Indeed, it is Victor Nunes Leal who declares: "... the express and exclusive municipal powers exclude any other competence, be it federal or state. Federal or state law that provides for express and exclusive matter of the Municipality, is not valid for violating the Constitution. It is an exorbitant law of the jurisdiction that enacted it. It cannot have any effect "(op. Cit., Pp. 325-326). it is Victor Nunes Leal who declares: "... the express and exclusive municipal powers exclude any other competence, be it federal or state. Federal or state law that provides for express and exclusive matter of the Municipality, is not valid for violating the Constitution. It is an exorbitant law of the jurisdiction that enacted it. It cannot have any effect "(op. Cit., Pp. 325-326). it is Victor Nunes Leal who declares: "... the express and exclusive municipal powers exclude any other competence, be it federal or state. Federal or state law that provides for express and exclusive matter of the Municipality, is not valid for violating the Constitution. It is an exorbitant law of the jurisdiction that enacted it. It cannot have any effect "(op. Cit., Pp. 325-326).

And not satisfied, he adds: "The same can be said now (that is, since the 1934 Constitution) about conflicts between municipal and federal or state laws. If the regulated matter is the exclusive competence of the municipalities, the conflict will be resolved in favor of the municipal law, because in such a case the other law (federal or state) will be invading the proper sphere of the Municipality, with violation of the constitutional text, and the Judiciary, consequently, deny it application "(op. cit., p. 106). To which, adds

Meirelles Teixeira: “In fact, the right that Municipalities have to organize and administer such services, ... (refers to local services) ... and so logical, so natural, according to the nature of things, so necessary to the life and full development of local communities that even in regimes of form of political and administrative centralization or in federative systems such as that of Argentina and the United States, in which municipal autonomy does not constitute, as we do, a constitutional principle, such law has always been recognized and widely practiced by communes” (“Public electricity services and local autonomy”, 1950, p. 55). For this reason, continues the aforementioned master: “And even in the face of Weimar's German Constitution, much less liberal than ours in matters of municipal autonomy, the most eminent of its exegetes showed there, despite, an essence of autonomous administration, overlapping the competence of the ordinary legislature, hence the unconstitutionality of any laws, federal or state agencies that snatched or materially reached this essence” (op. supra cit., p. 53). In other words, when the Federal Constitutional Charter is not limited to guaranteeing municipal autonomy, that of declaring it “a principle observable by States under penalty of federal intervention, but expressly ensures” especially regarding the organization of local services”?

Nor does it proceed to understand that the State, based on art. 14, sole paragraph, of the constitutional text, relating to the creation of municipalities and their division into districts, grants it the power to interfere with the organization of local services. Intelligence of this order would lead to the absurd conclusion that art. 15, precisely the guarantor of municipal autonomy, would mean nothing. Furthermore, the mentioned sole paragraph of art. 14 is a specific norm and not a principle. It has already been seen, the constitutional rule must be interpreted in accordance with the constitutional principles and not the other way around, since the principle of being a rule is marked, precisely, by the peculiarity of informing the entire system, radiating its content over all the others. norms: constitutional and infraconstitutional. It was precisely warning against the insufficiency of fragmentary, fragmented view of the different segments of the legal order, that Counselor Ribas, in the Preface of his “Brazilian Administrative Law, 1866, p. IX, he pontificated: “There is no science without the fundamental syntheses: once these are removed, there remains only a collection of ideas in whose labyrinth the intelligence cannot fail to turn. On the contrary, if they have these syntheses, the chaos is dissipated, light and order are made in thought; science is constituted”. The syntheses, which the old Ribas spoke of, constitute precisely the systematic understanding of the whole, which depends on the identification of the principles. Only heated to their fire can interpretation lead to the intelligence of the constitutional system. In the case, however, the required interpretative effort is scarce, since the clarity of the Brazilian constitutional text requires a clear understanding. The notion of municipal autonomy, as taught by Meirelles Teixeira - an author who, among us, developed the theme with greater accuracy - imposes itself on the State as a pre-existing data, a categorical precept, which has its own substance, since it was directly proposed by Constitution, hence, the definition of municipal competence, by the Union and the States “is bound, by ties of subordination to the concept of autonomy, and not to that” (“Municipal competence in the regulation of the services granted”, 1947, pages 16 and 17). Hence the constitution of such autonomy in the subjective public law of the Municipalities, opposed, therefore, to the State and the Union. 14, single paragraph, that the State is responsible for delimiting the municipal competence when creating the

Municipality and organizing it, by virtue of the fact that, once certain services are characterized as local, the State could no longer intend to dispose of their organization, leaving this to the exclusive judgment of the municipality, as expressly provided in art. 15, “b”, of the Federal Constitution.

Furthermore, the eminent Seabra Fagundes, a master renowned both for the strength of his science and for the serenity and pride of his spirit, in his luminous opinion on the matter, stressed that it is not possible to extract from art. 14, sole paragraph, of the constitutional text, interpretation that renders art. 15, which specifically highlighted the organization of local services. Especially when considering that the latter has the character of principle - vector, therefore, of the criterion of intelligence of the norms, among which art. 14 - it is clear that the state legislature exceeded the prerogatives it had when it intended to prevent the creation of Municipal Secretariats. In this case, it highlights the abuse of an ordinary state legislator because he also attacked, as Seabra Fagundes noted in that opinion, provision of the São Paulo Constitution (art. 15, n. II) which stipulated: “Municipalities should organize their administration and plan their activities, taking into account local peculiarities and technical principles suitable for the integral development of the community”, in which it Organic Law of Municipalities Possible possibility of providing for local peculiarities pertaining to the municipal organization. In short: both in view of the Brazilian constitutional text - which, in the matter, falls within the best tradition of our public law - when facing the incisive device of the Constitutional Charter of the State of São Paulo, art. 43 of the Organic Law of Municipalities, by limiting municipal autonomy and facing the power of “organizing local services”, proves to be unconstitutional,

Article originally published in *Revista de Direito Público*, São Paulo, year IV, n. 15, p. 284-288, Jan./Mar. 1971.

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Article originally published in *Revista de Direito Público*, São Paulo, year IV, n. 15, p. 284-288, Jan./Mar. 1971.

MELLO, Celso Antônio Bandeira de. Creation of municipal secretariats: Unconstitutionality of art. 43 of the Organic Law of Municipalities of the State of São Paulo. *Journal of Administrative Law and Infrastructure - RDAI*, v. 3, n. 11, p. 433-439, 30 sep. 2019. <https://doi.org/10.48143/rdai/11.cab.mello>

Published

2019-09-30

Edition

v. 3 n. 11 (2019).

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